Supreme Court, U.S.
FILED

01-227 AUG 08 2001

NO. _____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' APPENDIX
Volume II Pages 182-342

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August 2, 2001

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IN THE MATTER OF IMPLEMENTATION OF THE
CABLE TELEVISION CONSUMER PROTECTION
AND COMPETITION ACT OF 1992
CS Docket No. 98-82

IMPLEMENTATION OF CABLE ACT REFORM PROVISIONS
OF THE TELECOMMUNICATIONS ACT OF 1996
Review of the Commission's Cable Attribution Rules
CS Docket No. 96-85

REPORT AND ORDER
FCC 99-288
Adopted: October 8, 1999
Released: October 20, 1999

By the Commission: Commissioner Furchtgott-Roth concurring in part, dissenting in part and issuing a statement; Commissioner Tristani approving in part, dissenting in part and issuing a statement.

I. Introduction

1. This *Report and Order* resolves the issues presented for comment in the *Notice of Proposed Rulemaking* ("*Cable Attribution Notice*") in this proceeding[1] as well as two related issues raised in the *Cable Reform Notice*.[2] In the *Cable Attribution Notice*, we initiated a review of our cable attribution rules, which define what constitutes an "attributable" or "cognizable interest" that triggers application of various Commission

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[1] *Notice of Proposed Rulemaking*, CS Docket 98-32, FCC 98-112 (rel. June 26, 1998) ("*Cable Attribution Notice*").

[2] *In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Order and Notice of Proposed Rulemaking*, CS Docket No. 96-85, 11 FCC Rcd 5937 (1996) ("*Cable Reform Notice*").

rules relating to the provision of cable television services (the "substantive cable rules"). In this *Report and Order*, we adopt amendments that will more accurately identify interests that confer on their holders the ability to influence or control the operations of the held entity or create the type of economic incentives that the substantive cable rules are intended to address. In this regard, our amendments to the cable attribution rules mirror to a certain extent those amendments we recently made to the broadcast attribution rules; thus, our reasoning herein largely incorporates and reiterates the reasoning set forth in the *Broadcast Attribution Report and Order*.[3]

II. Background

A. The Cable Attribution Rules

2. A variety of statutory provisions and Commission rules govern the conduct of cable television system operators or other entities in terms of both ownership interests that they may hold in other cable operators or competitive firms, or in terms of their conduct when they own, are owned by, or are owned in common with a "video programmer," a "satellite cable programming provider," or with other entities. For each of these statutory provisions or rules it is necessary to identify what types of ownership interests or other relationships are sufficient that

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[3] *See Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Regulation and Policies Affecting Investment in the Broadcast Industry and Reexamination of the Commission's Cross-Interest Policy*, MM Docket Nos. 94-150, 92-51 and 87-154, *Report and Order* (rel. Aug. 6, 1999) ("*Broadcast Attribution Report and Order*"). The Broadcast Attribution Report and Order was issued after two notices for comment were issued. See *Notice of Proposed Rule Making, Review of the Commission's Regulations Governing the Attribution of Mass Media Interests*, MM Docket Nos. 94-150, 92-51 and 87-154, FCC 94-324, 10 FCC Rcd 3606 (1995) ("*Broadcast Attribution Notice*"); *Further Notice of Proposed Rule Making, Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Regulation and Policies Affecting Investment in the Broadcast Industry and Reexamination of the Commission's Cross-Interest Policy*, MM Docket Nos. 94-150, 92-51 and 87-154, FCC 96-436, 11 FCC Rcd 19895 (1996) ("*Broadcast Attribution Further Notice*").

two legally separate entities should be treated as if they were commonly owned or managed or subject to significant common influence. The rules define that level of interest that brings the substantive statutory provision or rule in play to be an "attributable interest." Thus, for example, the Communications Act, Section 613(f)(1)(A), instructs the Commission

> to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has **an attributable interest**.[4]

Section 628(b) provides that:

> It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has **an attributable interest** or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[5]

The attribution rules seek to identify those corporate, financial, partnership, ownership and other business relationships that confer on their holders a degree of ownership or other economic interest, or influence or control over an entity engaged in the provision of communications services such that the holders should be subject to the Commission's regulation.

3. Depending on the particular substantive rule and objective to be accomplished, a variety of different attribution standards are used in the Commission's rules. In the cable television area, there are, generally speaking, two strains of attribution rules: the "general attribution

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[4]47 U.S.C.§533(f)(1)(A) (emphasis added).

[5]47 U.S.C.§548(b) (emphasis added).

standard" and the so-called "program access attribution standard."[6] The general standard is based on, but not identical to, the broadcast attribution rules.[7] Under the general attribution standard, voting stock interests of 5% or more are attributab[8]] For passive institutional investors, voting stock interests of 10% or more are attributable.[9] Nonvoting stock interests, options, warrants and debt are not attributable[10] The general attribution standard provides a "single majority shareholder" exception to the voting stock threshold, which provides that a minority shareholder's voting interests will not be attributed where a single shareholder owns more than 50% of the outstanding voting stock.[11] Partnership interests and direct ownership interests are attributable regardless of the level of equity invested.[12] However, the interests of "insulated" limited partners are not attributed.[13] Directors and officers are also deemed to have an attributable interest.[14] The general attribution standard rules at issue in this proceeding are those that are used in conjunction with the cable horizontal ownership limits rule[15]

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[6]For a history of how the cable attribution rules developed, see *Cable Attribution Notice* at paras. 2-9.

[7]See *id.*

[8]47 C.F.R.§76.501 n.2 (a).

[9]47 C.F.R.§76.501 n.2 (c).

[10]47 C.F.R.§76.501 n.2 (f).

[11]47 C.F.R.§76.501 n.2 (b).

[12]47 C.F.R.§76.501 n.2 (a).

[13]47 C.F.R.§76.501 n.2 (a).

[14]47 C.F.R.§76.501 n.2 (h).

[15]47 C.F.R.§76.503.

and the vertical channel occupancy limits rule.[16] We applied the broadcast or general attribution standard to the horizontal limits and channel occupancy limits rules because they constitute broad structural rules designed to promote competition and diversity in the video-programming marketplace.[17]

4. The Commission adopted the program access attribution standard for cable rules that are designed not only to promote competition and diversity, but also to deter specific discriminatory or improper conduct.[18] The program access attribution standard captures more investment interests than the general attribution standard. Under the program access standard, the single majority shareholder and insulated limited partner exceptions do not apply. In addition, nonvoting stock and limited partnership equity interests of 5% or more are attributable.[19] The program access attribution standard rules at issue in this proceeding are used in conjunction with the following rules: program access,[20] carriage of an unaffiliated programmer,[21] SMATV/cable cross-ownership prohibition,[22] asset transfers between a cable operator and

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[16]47 C.F.R.§76.504.

[17] *Implementation of Sections 11 & 13 of Cable Television Consumer Protection and Competition Act of 1992 -- Horizontal and Vertical Ownership Limits, Second Report and Order*, MM Docket No. 92-264, 8 FCC Rcd 8565, 8568-69, 8577-8579, 8593-8596 (1993) ("*Horizontal Ownership Second Report and Order*").

[18]See *Cable Attribution Notice* at paras. 5-8 and orders cited therein for discussion on why the restrictive attribution standard was selected to apply to the substantive cable rules at issue in this proceeding.

[19] *Id.* at para. 5; see. e.g., 47 C.F.R.§76.501(d) n.5 (attribution rules for the cable/SMATV cross-ownership prohibition rule).

[20]47 C.F.R.§76.1001.

[21]47 C.F.R.§76.1300.

[22]47 C.F.R.§76.501(d).

an affiliate,[23] rate pass-throughs for the programming services of an affiliated programmer,[24] leased access[25] and open video systems.[26]

5. This *Report and Order* will also adopt final rules for the definition of the term "affiliate" for purposes of the local exchange carrier ("LEC") portion of the "effective competition" test,[27] and the cable-telco buy-out provisions enacted in the Telecommunications Act of 1996.[28] We asked for comment on the appropriate definition of an affiliate under these rules in the *Cable Reform Notice*.[29] However, because the *Cable Attribution Notice* initiated a more general review of the cable affiliation and attribution rules,[30] we decided to address these two issues in this proceeding.[31] We incorporate the Cable Reform comments into the record of this proceeding and rely on them in order to issue these final rules.[32]

6. Finally, we note that the *Broadcast Attribution* proceeding addressed the attribution rules that apply to the cable/broadcast station and ca-

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[23]47 C.F.R.§76.924(i).

[24]47 C.F.R.§76.922(f)(6).

[25]47 C.F.R.§76.970(b).

[26]47 C.F.R.§76.1503(c).

[27]See Communications Act§623(1)(1)(D), 47 U.S.C.§543(1)(1)(D).

[28]See Communications Act§652, 47 U.S.C.§572.

[29]*Cable Reform Notice*, 11 FCC Rcd 5937.

[30]See *Cable Attribution Notice* at para. 15 n.52 ("We seek comment on whether and how any changes in our cable attribution rules should affect our various definitions of 'affiliate.'").

[31]*See In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Report and Order*, CS Docket No. 96-85, FCC No. 99-57 at paras. 25, 91 (March 29, 1999) ("*Cable Reform Report and Order*").

[32]See Appendix B for a list of commenters in the *Cable Reform* proceeding.

ble/MMDS cross-ownership prohibitions; thus we do not address those rules in this *Report and Order*.[33]

B. Questions Raised in the *Cable Attribution Notice*

7. The *Cable Attribution Notice*, independently and through reference to the Broadcast Attribution Notice, sought comment on a number of issues relating to the attribution standards, including: (1) whether to increase the voting stock benchmark from 5 percent to 10 percent and the passive institutional investor benchmark from 10 percent to 20 percent; (2) whether to expand the category of passive investors; (3) whether and, if so, under what circumstances to attribute nonvoting shares; (4) whether to retain the single majority shareholder exemption from attribution; (5) whether to revise our insulation criteria for limited partners; (6) how to treat interests in limited liability companies ("LLCs") and other new business forms under the attribution rules; and (7) how to treat financial relationships and multiple business interrelationships that, although not individually attributable, should be treated as attributable interest when held in combination.

8. In addition to the issues raised in the initial *Broadcast Attribution Notice*, the *Broadcast Attribution Further Notice* explored additional proposals to increase the precision of the attribution rules. First, we invited comment on whether we should add a new equity/debt attribution rule. Under such a rule, where an interest holder is a program supplier or same-market media entity, we would attribute its otherwise non-attributable equity and/or debt interests in a media entity subject to the cross-ownership rules if those aggregated interests

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[33]This *Report and Order* nevertheless amends the attribution notes to 47 C.F.R.§76.501, which apply to the cable/broadcast station cross- ownership prohibition, because these notes are also used for our other cable rules. However, the amendments to these notes do not change the substance of the cable/broadcast attribution rules adopted in the *Broadcast Attribution Report and Order*.

exceed a specified benchmark, proposed to be set at 33 percent.[34] Second, we invited comments on a Commission staff study of attributable ownership interests in broadcast television stations, appended to the *Broadcast Attribution Further Notice*, and on the implications of this study regarding the impact of the proposed attribution rule changes, particularly as to the voting stock benchmarks.[35]

9. In addition to asking for comment on how these broadcast issues pertain to the cable industry, in the *Cable Attribution Notice* we asked for comment on (1) the proposed "equity plus debt" addition to the current cable attribution rules, and specifically those relationships in the cable context that may provide sufficient incentive and ability for an otherwise nonattributable interest holder to exert attributable influence or control; (2) the attribution of certain contractual or other business relationships in the cable context (including affiliations that allow different cable entities to purchase programming, technology or equipment on common terms) that may implicate diversity and competition concerns, irrespective of debt or equity; (3) the impact of raising the stock ownership benchmark for active and passive investors in the cable context, particularly seeking empirical data and analysis similar to the Commission staff study on the same subject in the broadcasting context; (4) whether to retain, modify, or eliminate the single majority shareholder exemption; and (5) whether a transition period or grandfathering of existing interests is appropriate if we decide to adopt more restrictive attribution rules.[36]

10. We also asked for comment on whether and how we should reevaluate the application of the program access attribution standard to certain of the rules described above, such as the program access and program carriage rules. Finally, we sought comment on whether and how any changes in our cable attribution rules should affect our

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[34] *Broadcast Attribution Further Notice* at paras. 8-25.

[35] *Id.* at paras. 36-38 and Commission staff study attached thereto.

[36] *Cable Attribution Notice* at para. 12.

various definitions of "affiliate."[37] In particular, we sought comment on whether and how those affiliation rules that are expressly based on our cable attribution rules should change if the underlying attribution rules are changed.[38] In the *Cable Attribution Notice*, we asked for comment on whether there were any relevant differences between the cable and broadcasting industries that would support a cable attribution standard that would differ from the broadcast attribution standard.[39] In this regard, we sought comment on any differences in, among other things, the ownership, financing or management structures of the cable industry and the broadcast industry that might warrant a different attribution standard.[40]

C. Summary of the Decisions of this Order

11. In general, we conclude that the cable industry's ownership and management structures do not in any relevant way differ from those of the broadcast industry such that the cable attribution rules should differ from the broadcast attribution rules. Thus, a large portion of this Report and Order will incorporate by reference the reasoning set forth in the *Broadcast Attribution Report and Order*. Where certain cable attribution rules depart from the broadcast attribution rules, the reasons for the departure are discussed. This *Report and Order* takes the following specific actions with regard to the cable attribution rules:

(1) retain the 5% voting stock attribution benchmark, but raise the passive institutional investor voting stock benchmark to 20%;

(2) retain the current definition of passive institutional investor;

(3) apply the limited partnership insulation criteria to limited

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[37] See, e.g., 47 C.F.R. ss 76.924(i), 76.970(b), 76.1500(g), 76.1401(b).

[38] *Cable Attribution Notice* at para. 15.

[39] *Cable Attribution Notice* at para. 13.

[40] *Id.*

liability companies;

(4) amend the insulation criteria for attribution of limited partnership interests for purposes of the horizontal ownership and channel occupancy limits rules;

(5) amend the waiver standard for the attribution of directors and officers for purposes of the horizontal ownership and channel occupancy limits rules;

(6) eliminate the single majority shareholder rule;

(7) adopt a 33% equity plus debt attribution rule that act as an exception to the insulated limited partner exception and the current exemptions from the attribution of non-voting equity and debt; and

(8) adopt certain transitional provisions relating to the application of these new rules to existing interests.

12. In addition, we clarify which entities are covered by the program access attribution standard. Under our substantive cable rules, such as the program access rule, it is arguable that the general attribution standard is applied to determine who or what constitutes a cable operator while the program access attribution standard is applied to determine who or what constitutes a programming vendor or other entity covered by the rule. Because the program access attribution standard was intended to apply to all entities under the rules where this standard applies, and because these substantive rules are designed to deter specific misconduct by all covered entities, we will amend these rules in order to clarify that the program access attribution standard applies to all entities covered by those rules. To reflect these clarifications of the attribution rules, we will amend our rules' various definitions of the term "affiliate" where appropriate.

13. With regard to the *Cable Reform* issues, we adopt the general cable attribution standard for the cable-telco buyout prohibition rule because that rule closely resembles the cable/SMATV cross-ownership rule, which is designed to promote competition. For the LEC affiliate prong of the effective competition test, we maintain the 10% voting equity benchmark proposed in the *Cable Reform Notice*, but devise a new

attribution rule for the LEC test.

14. Finally, we reject the cable operators' proposals that we discard the attribution rules in favor of an actual control approach to identifying cognizable interests. Such an approach would not accurately capture potentially influential or controlling interests, and would not be workable.

III. *Report and Order*

A. The General Attribution Standard

1. Background

15. In the *Cable Attribution Notice*, we requested comments relating to the general structure of the attribution rules; invited parties to discuss recent developments in the cable industry, including strategic alliances, partnerships, system swaps, mergers and acquisitions, relevant to application of these rules; and asked whether there were any differences in the ownership, financing or management structures, industry health, typical stockholdings, informal business arrangements, or outside financial claims of the cable industry and broadcast industry that would warrant different cable attribution rules.[41] This prompted a number of parties to suggest wholesale revisions to the traditional tools of the attribution rules. We address these comments first.

2. Comments

16. Cable operators generally, including NCTA, TCI,[42] and MediaOne,

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[41] *Cable Attribution Notice* at para. 16.

[42] On March 9, 1999, TCI merged with AT&T. TCI's cable systems are now owned by AT&T Broadband & Internet Services, Inc ("AT&T Broadband"), an AT&T subsidiary. TCI's programming subsidiary, Liberty Media Group, is now a separate subsidiary of AT&T. Because the comments in this proceeding were filed before the merger, we

argue that the cable horizontal ownership rules should not continue to follow the broadcast attribution rules because market conditions are different for the cable industry, new cable transactions allegedly insulate cable multiple system operators ("MSOs") from control over the newly created entities, and the Commission should adopt a "control" test for attribution. In response, alternative multichannel video programming distributors ("MVPDs") and a broadcaster argue that the market has not changed since the attribution rules were first enacted and that a "control" approach would not accurately capture influence and would not be workable.

a. Industry Differences

17. TCI argues that the Commission has in the past distinguished between different industries when it rejected a request that the broadcast attribution standard be applied to the telephone carrier/cable cross-ownership rule "largely because these two categories of multiple ownership rules relate at least in part to different industries, affect the interests of different parties, and have disparate underlying objectives."[43]

18. TCI notes that the purpose of the ownership rules is to promote competition and diversity. TCI contends that cable systems, unlike broadcasters, do not generally compete with each other in the same geographic areas for subscribers, local advertising revenues or programming.[44] As a result, TCI argues that the analysis of ownership concentration, competition, collusion and program diversity should

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will identify TCI's comments as those filed by TCI.

[43]TCI Comments at 8 n.15 (*quoting Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, Memorandum Opinion and Order*, MM Docket 83-46, 58 R.R.2d 604 at para. 22 (1985)).

[44]*Id.* at 12 n.26-27.

be different for cable than for broadcasting.[45] TCI, Comcast and NCTA argue that concerns regarding diversity are different for cable because, unlike a broadcaster, a cable operator provides dozens of channels to satisfy consumers.[46] Thus, NCTA argues that the ability of a minority interest in a cable system to significantly influence the viewing options available to a community cannot be equated with the magnitude of influence that a minority interest exerts on a single broadcast station that may only provide one programming option.[47]

19. MediaOne argues that the operators have not discouraged the development of new cable programming services.[48] By upgrading its systems from 550 MHz to 750 MHz, MediaOne states that it is adding 30 new analog channels, at least half of which will benefit unaffiliated programmers.[49] In addition, given the growth of direct broadcast satellite ("DBS") services, such as DIRECTV, which offers over 175 channels of cable programming, MediaOne states there is no longer reason for concern that operators will discourage new programming.[50] To compete with DBS, MediaOne states that operators must make diligent efforts to expand their channel capacity for new cable net-

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[45] *Id.* at 12 n.26-27.

[46] *Id.* at 15, NCTA Comments at 6; Comcast Reply Comments at 2.

[47] NCTA Comments at 6; *see also* Comcast Reply Comments at 5 (little risk that a minority, non-controlling investor will exert significant influence over the multitude of carried cable networks).

[48] MediaOne Comments at 6. Since 1992, cable networks have increased from 67 to 162, and of the 88 new networks, over 62% are unaffiliated with any cable MSOs. In addition, of the 77 newly planned cable networks, only 5 are affiliated with MSOs. *Id.* at 7 n.11 *(citing Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report,* 13 FCC Rcd 1034 Table F (1998) ("*1997 Competition Report*")).

[49] *Id.* at 10.

[50] *Id.* at 11; NCTA Comments at 6 (noting viewers can obtain alternative programming from other MVPDs).

works, regardless of an operator's interest in promoting affiliated programming.[51]

20. TCI argues that the evidence indicates that vertically integrated cable operators do not disfavor unaffiliated programmers in terms of rates or carriage.[52] In addition, TCI asserts that vertical mergers benefit consumers because a large, vertically integrated cable operator is better positioned than a stand-alone operator to know and satisfy consumers' viewing preferences.[53] Moreover, investors in cable operators are interested in the financial performance of the operator and will not, TCI asserts, tolerate actions designed to foreclose viewpoints or opinions for ideological purposes. Thus, widely held operators, TCI asserts, are prevented from controlling the viewpoints of the services they carry.[54]

21. Disputing the cable industry's arguments regarding the purposes of the applicable cable ownership rules, DIRECTV argues that the purpose of the various rules implicated in this proceeding is to check the bargaining power that MSOs have regarding programmers and the emerging MVPDs.[55] DIRECTV and Univision argue that the MSOs have not shown that the market has changed or that their behavior has changed, especially with regard to program access and must carry.[56]

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[51]MediaOne Comments at 11. TCI also argues that there are more programming outlets available today than when the big three networks were dominant. These include additional broadcast networks and non-cable MVPDs that provide service to more than 12 million homes. TCI Comments at 15-16.

[52]TCI Comments at 37.

[53]*Id.* at 39.

[54]*Id.* at 40.

[55]DIRECTV Reply Comments at 2-3; *see also* WCA Reply Comments at 3 (Commission should examine how liberalization of attribution rules will affect alternative MVPDs).

[56]DIRECTV Reply Comments at 2-3 (noting plethora of program access cases and the Commission's recent strengthening of the program access rules to provide damages);

DIRECTV notes that Comcast has refused to sell its Philadelphia regional sports network to DBS providers on the grounds that the program access rules do not apply to the terrestrial delivery of vertically integrated programming.[57] Univision states that regulatory safeguards such as must carry do not protect its cable network or its satellite-delivered network and that over half of its affiliated low-power stations are not entitled to must carry rights.[58]

b. The Cable Operators' Control Proposal

22. TCI and others, focusing on the horizontal ownership rules, argue that the current attribution standards impair the ability of cable operators to produce significant consumer benefits, realize efficiencies, and enhance competition in telephony and high speed data. Adelphia *et al.*, Time Warner, NCTA, TCI, Cablevision, MediaOne and Comcast propose various alternatives to the attribution rules where the investor would certify that it does not exercise control over the cable system at issue.[59] MediaOne, NCTA and TCI propose that minority interests not be attributable if the investor certifies that it does not control the

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Univision Reply Comments at 4 (noting that its San Francisco affiliate KDTV obtained on-channel cable carriage with 22 of TCI's 37 San Francisco systems only after the Commission ordered TCI to carry the affiliate in two 1998 orders); *see also* Univision Reply Comments at 8. Univision states that TCI dropped Univision's cable network in favor of TCI's affiliate, Telemundo, another Spanish-language network, once TCI acquired a Denver system. *Id.* at 9-10.

[57]DIRECTV Reply Comments at 5.

[58]Univision Reply Comments at 6.

[59]Adelphia *et al.* Comments at 3; Time Warner Comments at 34-35 ("a 5% equity interest is so small as to be essentially irrelevant"); Adelphia *et al.* Reply Comments at 3; Comcast Reply Comments at 3.

company's programming.[60] Regardless of the cable operator's interest or investment in a particular system, Adelphia *et al.* proposes that the Commission adopt a rule where a cable operator would be deemed to not "control" a system for horizontal ownership attribution purposes if it could certify that it (1) cannot dictate programming decisions, (2) does not control a majority of the governing board or committee, (3) does not prepare the operating or capital budget (but can review the budget prepared by the managing partner), (4) does not control personnel matters, (5) cannot dictate the use of particular technology, (6) does not have the unilateral right to acquire a controlling interest in the venture.[61] Adelphia *et al.* argues that a cable operator's super-majority approval rights over the sale of assets, dissolution or change of status of an entity are not indicia of control for attribution purposes.[62]

23. NCTA argues that unless an investor has control over a cable system, it is difficult to discern how diversity is implicated because there is little risk that a minority investor will restrict a company's editorial control.[63] TCI argues that an attribution standard based on operational control is the least restrictive and most efficient method for

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[60]MediaOne Comments at 25; MediaOne Reply Comments at 4; NCTA Comments at 10 (if an investor does not own 50% of more of a company's voting stock, the investor's interest should not be attributable if the investor certifies to the Commission that the investor cannot dictate programming decisions). TCI proposes that no interest, including a partnership interest, less than 10% be attributable. In cases where an MSO has an interest that is more than 10% and less than or equal to 50%, TCI argues that the interest should not be attributable if the MSO certifies that it will not control the company generally and specifically will not control the company with respect to programming, personnel, budget, and technological choices. TCI Comments at 2-3 n.3, 18-19.

[61]Adelphia *et al.* Comments at 20. Time Warner argues that a non-managing joint venture partner should be entitled to vote on budget matters without having an interest attributable to it. Time Warner Comments at 36.

[62]Adelphia *et al.* Comments at 12; *see also* Time Warner Comments at 35-37.

[63]NCTA Comments at 8.

the Commission to identify attributable interests. TCI states that attempting to identify "influential" interests in a set of rules is difficult given the alternative ways in which an interest holder's influence might be limited by factors which the rules do not examine.[64] TCI argues that a bright line test, such as the 5% equity interest benchmark, does not necessarily identify interests that posed a threat to the purpose of the ownership rules and therefore unnecessarily limits beneficial investments.[65] The cross-interest policy, which was adopted to identify influential interests not specifically addressed by the attribution rules, examined potential influential interests on a case-by-case basis. TCI argues that this ad hoc approach is slow and expensive.[66] TCI argues that the Commission permits regulated entities to self-certify in a variety of other circumstances because self-certification is efficient and less costly and does not impose an overbroad restriction or require a case-by-case determination.[67]

24. RCN argues that a "control" approach would not be workable because it is vague, would require the devotion of significant resources to a case-by-case analysis of each system, and would invite the creation of carefully designed corporate interests that would indicate lack of

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[64]TCI Comments at 26 (*citing An Economic Analysis of the Effects of Partial Ownership Interests in Cable Systems* at 8, Stanley M. Besen, Daniel P. O'Brien, John Woodbury, and Serge X. Moresi (Aug. 14, 1998) ("*Besen, O'Brien, Woodbury, and Moresi*") (attached to TCI Comments). For example, other large minority shareholders or a coalition of smaller shareholders might limit a minority shareholder's power. TCI Comments at 26; *Besen, O'Brien, Woodbury, and Moresi* at 8.

[65]TCI Comments at 28.

[66]TCI Comments at 30.

[67]TCI Comments at 20. For example, the Commission permits self- certification that a licensee does not cause unacceptable interference with the radio spectrum, an entity's passive investors are indeed passive, an applicant in a competitive bidding process is qualified to bid, an officer or director does not perform certain duties such that an interest should be attributed to the officer or director, and a limited partner's interest meets the insulation criteria. *Id.*

control on paper but would not reflect the actual influence that such interests would carry.[68] RCN observes that the practicalities of corporate decision-making are different from structures set forth on paper. RCN argues that a rational decision-maker will make decisions in the best interests of its investors, whether the investors vote or not.[69] CU states that cable operators need little or no direct ownership in a cable system in order to exert pressure with contractual rights.[70] CU states that partners who have minimal ownership use methods to protect their interests by creating options, put-sell provisions, and rights of refusal provisions in partnership agreements.[71]

25. NCTA asserts that the Commission has endeavored to "permit arrangements [under the attribution rules] in which a particular ownership or positional interest involves minimal risk of influence, in order to avoid unduly restricting the means by which investment capital may be made ...."[72] Most of the cable operators argue that the current rules interfere with the benefits of clustering their systems.[73] They argue that clustering benefits subscribers by enabling cable operators to lower costs; improve current services; more efficiently deploy new, innovative services such as internet, interactive video and telephony; develop and distribute regional programming services; and provide centralized, more responsive customer service.[74]

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[68]RCN Comments at 14-15.

[69]RCN Reply Comments at 16.

[70]CU Comments at 3.

[71] *Id.* at 3.

[72]NCTA Comments at 9 *(citing Review of the Commission's Regulations Governing Attribution of Broadcast Interests,* MM Docket No. 94-150, 10 FCC Rcd. 3606, 3610 (1995)).

[73]MediaOne Comments at 30; NCTA Comments at 23.

[74]Cablevision Comments at 10, 13 ("As the Commission has recognized, clustering can 'reduce costs and improve operating and management efficiencies,' position cable

26. AT&T, TCI, NCTA and MediaOne argue that the Commission should take into account not only the benefits to video programming, but also the benefits that clustering and economies of scale offer for bundled voice, data and cable services.[75] They argue that the Commission should consider the benefits of enabling cable operators to compete with incumbent local exchange carriers ("ILECs") to provide these services.[76] Cable operators argue that they cannot compete with ILECs without being able to form larger clusters comparable in size to the areas served by some of the newly merged ILECs, which are not subject

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operators to serve as an outlet for regional advertising, and 'enhance MSOs ability to compete successfully in the future with LECs and major electric utilities as providers of data transmission and local telephone services."') (*quoting 1997 Competition Report*, 13 FCC Rcd at 1115); Bresnan Comments at 6-7 (clustering systems lowers per-subscriber cost of new services because more people bear the cost); AT&T Comments at 11 (large customer base must be substantial to justify upgrading facilities to compete with ILECs); TCI Comments at 49-53; TCI Reply Comments at 19 (noting that a cable operator with a small subscriber base would not be able to recover its development costs for cable internet development); Bresnan Comments at 5, 22- 23 (cable modems and digital cable television); NCTA Comments at 9 (clustering reduces duplicative costs); MediaOne Comments at 14; Time Warner Comments at 10; Adelphia *et al.* Reply Comments at 6; Comcast Reply Comments at 6; Cablevision Reply Comments at 7. MediaOne also argues that clustering enables MSOs to advertise their services in order to counter competition from other types of MVPDs. MediaOne Comments at 14.

[75]MediaOne Comments at 7; AT&T Comments at 5 (noting that two of the horizontal limits statutory factors require the Commission to examine "any efficiencies and other benefits" of increased ownership and "the dynamic nature of the communications marketplace"); TCI Comments at 46-49; NCTA Comments at 12 (Commission should take note of convergence of technologies); MediaOne Reply Comments at 2 (current rules hinder its ability to deliver advanced services); Time Warner Reply Comments at 6. MediaOne states that by the end of 1998, over 2.4 million homes passed by its network will be able to receive high-speed Internet access service. MediaOne Comments at 17.

[76]AT&T Comments at 6-9; MediaOne Reply Comments at 9. NCTA and TCI note that an ILEC, Ameritech, opposes clustering. NCTA Reply Comments at 4; TCI Reply Comments at 15.

to subscriber limitations and are able to enjoy the benefits of economies of scale.[77]

27. Adelphia *et al.* argue that there are numerous benefits to their alliances with TCI: (1) TCI partners are able to create more efficient and larger regional clusters, (2) Falcon and Insight will be able to maintain a presence in the cable market unlike other independent cable operators who have been forced to sell, (3) TCI partners benefit from TCI's capital and technical experience, and (4) their alliances with TCI have enabled the partners to reach a critical mass so that they are able to offer better, less expensive technology to subscribers.[78] As a result of clustering and TCI's financial, technical and programming support,

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[77]Cablevision Comments at 3, 9-10 (arguing that clustering will enable cable operators to remain competitive with their rivals such as the newly merged Bell Atlantic/NYNEX/GTE and SBC/Pacific/Ameritech/SNET); Bresnan Comments at 6; Cablevision Reply Comments at 18-19; Comcast Reply Comments at 6; Time Warner Reply Comments at 8 (combined SBC/Ameritech and combined Bell Atlantic/GTE will respectively control 33.8% and 35.8% of the nation's local access telephone lines); AT&T Comments at 10; TCI Comments at 53-56; Time Warner Comments at 10; MediaOne Reply Comments at 9; NCTA Reply Comments at 4 (cable's potential as a competitive local exchange carrier is dependant on clustering); MediaOne notes that other cable competitors are also not limited to size limitations, such as DBS providers. *Id.* In MediaOne's largest region, the Northeast, it provides service to 1.2 million customers while the FCC-approved merger of Bell Atlantic and NYNEX provides 43,714,000 access lines. *Id.* at 18. MediaOne argues permitting clustering is the only affordable way to achieve these benefits and attract the capital that the LECs are capable of attracting. MediaOne Comments at 15. According to MediaOne, NYNEX saved more than 25% on a $1.5 billion purchase as a result of its merger with BellAtlantic, and SBC and Ameritech project $1 billion in annual savings from their planned merger. *Id.* at 18. The CLECs were able to raise $15 billion over two year to construct local exchange facilities, and five regional bell operating companies and GTE invested $24 billion in 1996 and $26.3 billion in 1997 to enhance their networks for advanced data services. *Id.* at 20; *see also* MediaOne Reply Comments at 9.

[78]Adelphia *et al.* Comments at 11-12. Falcon also states that it was not able to obtain capital for upgrading its systems until it entered into an alliance with TCI. *Id.* at 10. LCI states that it has been able to benefit from the research and experience that only a large MSO like TCI can afford. *Id.* at 19.

TCA and Bresnan argue that they are able to rebuild their systems to provide hybrid fiber coaxial ("HFC") architecture which enables them to provide more channel capacity, multiplexed networks, advanced pay-per-view programming, internet service and telephony.[79]

28. Cablevision acquired approximately 800,000 subscribers from TCI in the New York area, which brought Cablevision's number of subscribers to more than 2.5 million in the New York metropolitan area.[80] Cablevision argues that without TCI's involvement, Cablevision would not have been able to cluster its systems and develop an economy of scale that would have permitted it to achieve the economic benefits of clustering. Through clustering, Cablevision argues that it was able to successfully develop local programming because there are more local subscribers.[81]

29. DIRECTV and Ameritech argue that an MSO's subscribers do not pay lower costs simply because of the purported efficiencies of clustering. Rather, MSOs, they reason, are able to charge lower costs because they use their large size to obtain programming on more favorable terms than smaller companies: "Because this advantage is not grounded in superior efficiency, it is a barrier to effective competition in the multichannel video services industry."[82] TCI argues that if another cable operator cannot achieve the scale necessary to achieve lower

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[79]Bresnan *et al.* Comments at 7-12.

[80]Cablevision Comments at 4.

[81]Cablevision currently offers "MSG Metro" in the New York metropolitan area. MSG Metro consists of three channels that provide information and entertainment that reflect localized needs and interests. Cablevision Comments at 13 n.18. The ability to serve, as well as spread programming costs over, a greater number of subscribers in a geographically dense area increases the likelihood that a cable operator will develop local and regional programming. Bresnan Comments at 5.

[82]*J. Dertouzos & S. Wildman, Programming Access and Effective Competition in Cable Television* (Aug. 14, 1998) at i., attached to Comments of Ameritech. *See also* DIRECTV Reply Comments at 3-5; RCN Reply Comments at 9 (clustering gives MSOs ability to fight competition from emerging MVPDs).

programming costs, it should be attributed to that cable operator's unpopularity with consumers rather than the fact that another cable operator is able to obtain lower programming costs.[83]

30. RCN argues that how the MSOs will compete with LECs is irrelevant to this proceeding.[84] RCN and Univision argue that TCI's stake in Cablevision and its joint ventures with Adelphia *et al.* will give TCI an important voice in their business plans, harm consumers, and impede competition.[85] Ameritech argues that TCI's system swaps and joint ventures have significantly increased TCI's market power by giving it access to more subscribers.[86] For example, Ameritech notes that TCI's contribution of 850,000 subscribers to Cablevision now gives TCI an attributable interest in Cablevision's 3.5 million subscribers.[87] Given these joint ventures coupled with its ownership of Satellite Services, Inc. ("SSI") (a TCI subsidiary that sells to TCI partners "[m]any of the popular networks... at rates which are lower than those which would otherwise be obtainable"[88]), TCI can obtain, Ameritech asserts, virtually any terms it wants from a cable programmer, including exclusivity and steep discounts from even unaffiliated cable programmers.[89] Univision states that given TCI's investment in the joint ventures, it is implausible that the small cable operators will ignore any "suggestions" that TCI might make.[90] RCN notes that the FTC approval

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[83]TCI Comments at 8.

[84]RCN Reply Comments at 17.

[85]RCN Comments at 10, 14; RCN Reply Comments at 16; Univision Reply Comments at 13.

[86]Ameritech Comments at 8.

[87]*Id.* at 8.

[88]*Adelphia et al.* Comments at 8.

[89]*Id.* at 9.

[90]Univision Reply Comments at 13.

of the TCI/Cablevision transaction was based on an antitrust analysis, rather than the public interest analysis that the Commission should apply under Section 613 of the Communications Act, and is therefore irrelevant to this proceeding.[91]

31. Cablevision argues that its transaction with TCI enhances competition by enabling Cablevision to compete with Bell Atlantic, DIRECTV and RCN.[92] Furthermore, Cablevision argues that TCI's transactions actually reduce TCI's market power by transferring subscribers to another company.[93] Time Warner argues that the structure of TCI's joint ventures will not pose an anticompetitive risk.[94]

32. If the control certification proposals discussed above are not accepted or if an operator cannot make the necessary certification, Adelphia *et al.* argues that as long as the operator owns 50% or less of a venture and does not have managerial control, the operator should be attributed with only its pro rata share of the venture's subscribers.[95] Likewise, Time Warner and MediaOne propose that an MSO should only be attributed with the percentage of a corporation or a partnership's subscribers that equals the MSOs percentage equity interest in the corporation or partnership.[96] For example, if an MSO holds a 25% interest in a partnership, MediaOne argues that only 25% of the partnership's subscribers should be attributed to the MSO.[97]

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[91]RCN Reply Comments at 9.

[92]Cablevision Reply Comments at 9.

[93]*Id.* at 18.

[94]Time Warner Reply Comments at 27.

[95]Adelphia *et al.* Comments at 20-21; *see also* Bresnan *et al.* Comments at 22 (at the very least, the Commission should attribute only the percentage of an operator's cable subscribers to an investor that equals the investor's equity interest in the entity).

[96]Time Warner Comments at 18; MediaOne Comments at 26-28.

[97]MediaOne Comments at 26-28.

3. Discussion

33. The cable operators focus their arguments on the attribution rules applicable to the horizontal ownership rules. However, the cable operators have not presented a valid basis for a radical departure from our attribution rules framework, a framework that Congress found appropriate for the Commission to consider for the horizontal ownership rules.[98] The cable operators have not shown differences in the ownership, financing or management structures between the cable and broadcast industries that would warrant creating such a different type of attribution standard for the cable horizontal ownership or other cable rules.

34. Cable operators argue that the programming market has evolved so that even large MSOs have a limited impact on programming, and the attribution rules associated with the horizontal ownership rules inhibit cable clustering. In addition, they argue that the cable attribution rules should be different from the broadcast attribution rules because, unlike broadcasters, cable operators generally do not compete on the local level and the purposes of the broadcast and cable rules are different. These arguments are more appropriately addressed to the scope of the horizontal ownership rule itself, rather than the attribution rules. As we recently stated in the *Broadcast Attribution Report and Order,*

The attribution rules are designed to attribute entities that wield significant influence on core operations of the licensee. It is the ownership rules that limit investment based on our core policies of diversity and competition.[99]

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[98] *See Report of the Senate Committee on Commerce, Science and Transportation,* S. Rep. No. 92, 102d Cong., 1st Sess. 80 (1991) ("*Senate Report*") ("In determining what is an attributable interest, it is the intent of the Committee that the FCC use the attribution criteria set forth in 47 C.F.R.§73.3555 (notes) [the broadcast attribution rules] or other criteria the FCC may deem appropriate.").

[99] *Broadcast Attribution Report and Order* at para. 46.

Arguments with respect to the status of the programming market, vertical integration, non-cable competitors and cable clustering were properly raised and resolved in our companion Horizontal Ownership Third Report and Order.[100] Any changes to the horizontal ownership limits should be accomplished directly through an alteration of the limit rather than through a manipulation of what is considered to be ownership.[101]

35. In any event, we disagree with NCTA and TCI's argument that differences in the services that cable operators and broadcasters provide in the local market present a basis for establishing different sets of attribution standards for the local broadcast ownership rules and the cable horizontal ownership rules. What is relevant here is the market to which the rules are directed and the purposes of the rules. The appropriate market for an analysis of the horizontal ownership rules is the national market, not the local market.[102] In the horizontal ownership limits statute, Section 613, Congress directed the Commission to set limits on the concentration of ownership at the national level.[103] Congress was concerned that the anticompetitive effects of increased concentration at the national level might reduce the availability of diverse programming content.[104] Thus, although the local broadcast

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[100] *See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Third Report and Order*, MM Docket No. 92-264, FCC No. 99-289 (Oct. 20, 1999) ("*Horizontal Ownership Third Report and Order*").

[101] *Broadcast Attribution Report and Order* at para. 46.

[102] *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fifth Annual Report* at paras. 125, 152-153, CS Docket No. 98-102 (rel. Dec. 23, 1998) ("*1998 Competition Report*").

[103] See 47 U.S.C.§533(f)(1)(A).

[104] See 47 U.S.C.§533(f)((2)(A)-(G) for list of statutory factors that the statute directs the Commission to consider in order to preserving diverse and innovative programming. See *Horizontal Ownership Second Report and Order*, 8 FCC Rcd at 8568 ("Congress sought to prevent large, vertically integrated cable systems from creating barriers to entry for

rules and the horizontal ownership rules address different markets, their purposes are the same: both sets of rules are designed to promote competition within the industry and a diversity of viewpoints and programming.[105] Given that the cable horizontal ownership limits and the broadcast ownership rules serve similar purposes, it is appropriate, with certain exceptions discussed below, to use the same attribution standards for these rules. As discussed below, the cable operators do not persuade us that the broadcast attribution standards do not accurately capture equity or debt interests that convey influence or control.

36. We also continue to believe that the cable operators' "control" proposals, which we previously rejected in the *Horizontal Ownership Second Report and Order*,[106] do not take into account the variety of ways that an investor may exert influence or control over a company. An individual or firm does not need actual operational control over (or to be the management of) a company in order to exert influence and control over that company.[107] As discussed below, equity, debt and partnership interests confer on their holders influence and control, regardless of whether the holders maintain operational control of the company.[108] Moreover, the TCI transactions discussed in the record of

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new programmers and from causing a reduction in the number of media voices available to consumers.").

[105]See *Cable Attribution Notice* at para. 4.

[106]*Horizontal Ownership Second Report and Order* at para. 35.

[107]*See In re Amendment of Parts 20 and 24 of the Commission's Rules: Broadband PCS Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap, Report and Order,* WT Docket No. 98-205, FCC 99-244 at para. 91 (Sept. 22, 1999) (rejecting control proposal for wireless rules).

[108]*See In re Amendment of Parts 20 and 24 of the Commission's Rules: Broadband PCS Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap, Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, Report and Order* WT Docket No. 96-59, GN Docket No. 90-314, FCC 96-278, 11 FCC Rcd 7824 at para. 121 (1996) (rejecting control proposal by noting that minority owner may exert influence by challenging

this proceeding demonstrate the control proposal's lack of credibility.[109] TCI's transactions include joint ventures where it has between a third and half the members of the board, rights of first refusal and supermajority rights or the right to veto fundamental decisions such as the sale of assets, declaration of bankruptcy, issuance of equity interests, consolidations, mergers, and capital calls. These rights clearly confer some degree of control or influence by TCI over the joint ventures. We agree with RCN and CU that, under these circumstances, it is more likely that a reasonable entity will consider the spoken or unspoken interests of its investors.

37. TCI's relationships with its partners demonstrates the influence that an investor can have over an entity even if the investor does not have actual, operational control over the entity's programming. Each of TCI's partners may take advantage of TCI's industry alliances, even if the partner is not required by TCI to do so. In the case of programming, each of TCI's partners can purchase at a low price cable programming networks that TCI has chosen to do business with.[110] We find it unlikely that the TCI partners would purchase the same cable networks at a higher price from a company other than TCI's subsidiary, SSI. We agree with Ameritech that the programming purchases by TCI's partners from SSI extend TCI's power in the programming marketplace.[111] Cable networks selected for carriage by TCI have a greater chance of being carried by the TCI partners. Conversely, cable networks not carried by TCI are placed at a disadvantage because they are

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business decisions, conducting or threatening litigation or by insisting upon business audits).

[109]See Attachment C for details of MSO transactions.

[110]See Adelphia *et al.* Comments at 8-9; Bresnan *et al.* Comments at 13.

[111]Given these joint ventures coupled with its ownership of SSI, TCI can obtain, Ameritech asserts, virtually any terms it wants from a cable programmer, including exclusivity and steep discounts from even unaffiliated cable programmers. Ameritech Comments at 8.

required to compete with discounted SSI cable networks for carriage on the TCI partners' cable systems.

38. In addition, the control proposals would be unworkable and would not provide regulatory certainty.[112] Under the control proposals, there are too many variables that the Commission and interested parties would have to weigh before a determination of non-con... could be made. For example, the Commission would be required to examine, among other things, the contracts between the parties (such as contracts between TCI's programming distributor subsidiary SSI and the TCI affiliates), the entity's corporate documents, the prior and current course of dealings between the parties, the structure of their board and management, and the rights and obligations of the interested parties. Many of these factors are subject to change over time.

39. With regard to the proposal that an investor be apportioned a percentage of a cable system's subscribers equal to the investor's percentage equity interest, we find no basis in the statute or in fact or theory to support such a rule. This proposal assumes that there is some logical basis for attributing an investor only some proportional influence over a cable system commensurate with the investor's percentage equity interest or that there would be some equitable reason to proceed in this manner. Investor A's 25% equity interest in cable system X, however, does not limit investor A's influence to 25% of cable system X's subscribers or 25% of the decision made by the system. Investor A's 25% equity interest enables it to exert influence or control over all aspects of the operation of the system, including what programming the system selects for all of its subscribers

B. Voting Equity Benchmark

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[112] *See In re Amendment of Parts 20 and 24 of the Commission's Rules: Broadband PCS Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap, Report and Order*, WT Docket No. 98-205, FCC 99-244 at para. 91 (Sept. 22, 1999) (rejecting control proposal for wireless rules).

40. We turn next to suggestions for more specific changes in the attribution rules and address first those provisions of the rules that apply in common to both the general and program access attribution provisions. For both types of rules a 5% voting equity interest would be considered an attributable interest.[113] A number of parties have suggested that 5% is too low a number.

1. Comments

41. Bresnan, Time Warner, Chase, Mediacom and Comcast argue that the attribution standard for the cable horizontal ownership cap should be relaxed so that cable operators will have greater access to capital in order to upgrade their systems to true broadband service,[114] to implement new technologies, such as digital television,[115] and to increase investment in new programming services.[116] Bresnan argues that TCI's ownership interest in it and TCI's assistance to it will benefit subscribers who will then have access to hundreds of channels of programming at low costs due to the cost efficiencies of Bresnan's partnership with TCI.[117] Chase argues that the 5% voting interest threshold is simply too low a threshold for many institutions to invest.[118] Chase reasons that

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[113]47 C.F.R.§501 n. 2(a).

[114]Bresnan Comments at 15-16; Time Warner Comments at 46; Comcast Reply Comments at 3-4; Time Warner Reply Comments at 23-25; Chase Comments at 3; Mediacom Comments at 2-6. MediaOne states that cable operators will spend between $20 and $28 billion to upgrade their systems to accommodate internet, telephony, and digital programming. MediaOne Comments at 7-8; *see also* NCTA Comments at 14.

[115]Time Warner Comments at 47-49

[116]Time Warner Comments at 49.

[117]Bresnan Comments at 17-18.

[118]Chase Comments at 4. Chase is an institutional investor that holds an attributable interest (less than 10%) in Mediacom, a cable systems operator, and a 23% interest in

raising the voting benchmark to 10% will not give investors ultimate control over the company, but will recognize that investors must have some input to reduce the risk of the investment.[119]

42. Except for the horizontal ownership attribution rules that Time Warner believes should be abolished, Time Warner argues that the Commission should raise the voting benchmark to at least 10% and could safely raise it to 20% in order to increase the availability of capital.[120] NCTA argues that there has been no showing that an investor with a 5% interest has the ability to direct a system's core functions. NCTA notes that the Department of Interior uses a 10% threshold for acreage limitations, the SEC uses a 10% threshold for insider trading rules, and the Department of Transportation uses a 10% threshold for certain reporting requirements. Time Warner states that the Commission uses higher benchmarks for other rules such as a 20% direct and 25% indirect equity interest held by aliens in broadcast properties and the 40% interest that small businesses or rural telephone companies are permitted to hold for purposes of the CMRS spectrum aggregation limit.[121]

Wireless One, Inc. ("Wireless One"), a wireless cable service provider. Because Wireless One provides wireless services in some franchise areas served by Mediacom and because Chase's interest in both entities are currently attributable under the cable/MDS cross ownership restriction, Mediacom applied for and attained a twelve month waiver of the restriction. Mediacom Comments at 1-2. Chase and Mediacom also request that the Commission relax the more restrictive attribution standard applicable to the cable/MMDS cross-ownership rule. Chase Comments at 7-8; Mediacom Comments at 11-16. This issue was not raised in the *Cable Attribution Notice* and was in fact resolved in the *Broadcast Attribution Report and Order.*

[119]Chase Comments at 5.

[120]Time Warner Comments at 51-52 (Time Warner argues that Seagram Company Limited's 14.9% interest in Time Warner was not sufficient to dissuade Time Warner management from purchasing WTBS(TV)); *see also* Cablevision Reply Comments at 15 (recommending raising benchmark to 10%); Comcast Reply Comments at 3 (same).

[121]Time Warner Comments at 52-53.

43. TCI challenges the voting equity benchmark bright line test on the grounds that the "size of the financial interest [is] a highly imprecise indicator of the extent to which the financial interest conveys control."[122] TCI asserts that, in order to determine an investor's control, other factors must be examined, such as the composition of the board, who has authority over management, and the size of other minority shareholders.[123] However, TCI also argues that a case by case analysis of such factors would be too costly in terms of time and money.[124] TCI therefore proposes that the Commission adopt its control certification approach as a middle ground between a bright line test and a case by case analysis.

44. RCN argues that the program access standard should apply to the horizontal ownership rules in order to prevent cable companies from clustering in major markets and blocking RCN from those markets.[125] Comcast states that RCN's request is based on little more than a desire to achieve a competitive advantage.[126] Time Warner states that the need for investment far outweighs a theoretical risk of anticompetitive influence and that RCN's proposal runs counter to the deregulatory intent of the Telecommunications Act of 1996.[127] Because RCN's clustering proposal is more appropriately addressed in the context of the substantive horizontal ownership rules, we do not address it here.[128]

2. Discussion

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[122]TCI Comments at 27 (*quoting Besen, O'Brien, Woodbury, and Moresi* at 8).

[123]TCI Comments at 27 (*citing Besen, O'Brien, Woodbury, and Moresi* at 8).

[124]TCI Comments at 30.

[125]RCN Comments at 16-17.

[126]Comcast Reply Comments at 8.

[127]Time Warner Reply Comments at 26.

[128] *See Horizontal Ownership Third Report and Order* at para. 62.

45. In establishing voting equity provisions of the attribution rules, we focus on issues of control or influence. The attribution rules are intended to exempt from attribution ownership or positional interests that present minimal risk of influence in order to avoid unduly restricting access to capital but to attribute those interests that permit a significant potential for influence or control.[129] Based on the record of this proceeding, our parallel review of the broadcast attribution rules, a review of similar standards by other regulatory agencies, and academic studies relating to corporate governance, we conclude that the existing 5% voting share benchmark better takes into account the relevant considerations than any alternative at has been proposed.[130] We recognize that the dynamics of corporate life are varied and change over time. Thus, it is understandable that a provision of this type may be thought to be an ill fitting test of control or influence in some circumstances that might be revealed by a detailed review of the facts of particular situations. Such a particularized review process, however, would provide no certainty to parties planning transactions and would not necessarily lead to enduring conclusions even as to a particular entity. It is necessary therefore to analyze general benchmarks in order to develop a proper standard.

46. In earlier proceedings, we found, based on an ownership survey, that, in a widely-held corporation, a 5% shareholder is likely to be one of the largest 2 or 3 shareholders and therefore to be in a position to command the attention of management, and that a 5% benchmark was an appropriate threshold for attribution of interests in a closely-held corporation based on several possible ownership scenarios.[131] There is a body of more recent academic evidence that tends to confirm our

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[129]Broadcast Attribution Notice, 10 FCC Rcd at 3610.

[130]See *Broadcast Attribution Report and Order* at paras. 10-15.

[131]*Attribution of Ownership Interests*, 97 FCC 2d 997, 1005-08 (1984) ("*Attribution Order*"); *on recon.*, 58 RR 2d 604 (1985) ("*Attribution Reconsideration*"), *on further recon.*, 1 FCC Rcd 802 (1986) ("*Attribution Further Reconsideration*").

earlier conclusions, demonstrating that interest holders of 5% can likely exert considerable influence on a company's management and operational decisions. One recent study demonstrated that block trades involving 5 to 10 percent of a firm's voting stock resulted in a 27 percent turnover rate of the chief executive officer of the traded firm, that a 20 to 35 percent block trade resulted in a 40 percent turnover rate of the CEO, and that block trades over 35 percent of the voting equity resulted in a 56 percent turnover rate.[132] The turnover of the CEO was tracked over a one- year period following the date of the trade. These results, spanning an increasing level of ownership starting at 5 percent, demonstrate a consistent relationship between ownership trades and the rate of replacement of top management. The results imply that investors who acquire and hold such large blocks of voting stock can influence the choice of management of the firms in which they invest.

47. Another study presents evidence that 5 percent or greater stockholders vote more actively than less-than-five percent shareholders, and they tend to vote more often against the recommendations of management in votes over corporate anti-takeover amendments.[133] This study suggests that larger owners, starting at a 5 percent level of ownership, tend to be more active in influencing management than smaller owners. The two studies considered together provide evidence that ownership percentages starting at 5 percent can influence management policies.

48. Based on these studies, we therefore disagree with TCI's argument that the voting equity benchmark is too highly imprecise to be usable in the rules. Moreover, the voting equity benchmark is superior to a test requiring a case- by-case review of each and every cable transaction because it reduces regulatory costs, provides regulatory certainty, and permits planning of financial transactions.

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[132]L.E. Ribstein, *Business Associations* 987 (1990).

[133]J.A. Brickley, R.C. Lease and C.W. Smith, *Ownership Structure and Voting on Anti-takeover Amendments*, 20 Journal of Financial Economics 267-291 (1988).

49. We also disagree with commenters' arguments that the cable equity benchmark should conform to certain 10% benchmarks adopted by other federal agencies.[134] Those agencies' rules serve different interests than the Commission's ownership rules. For example, the Department of Transportation's 10% rule is designed to identify substantial interests, and the SEC's insider trading rule is designed to prevent intrinsically illegal or undesirable activities. Our rule is more analogous to the SEC's 5% ownership reporting benchmark.[135] Under the SEC 5% benchmark, any person who becomes a direct or indirect owner of more than 5% of any class of stock of a company must file a statement with the SEC.[136] The general purpose of this reporting requirement is to ensure that investors are alerted to potential changes in control, which is similar to the attribution rule's goal of identifying interests which confer on their holders the potential for influence or control.[137]

50. The commenters in this proceeding have not shown that other Commission attribution rules have similar purposes to the cable rules such that the attribution standards should be the same. The 40% CMRS spectrum rule[138] is designed to foster ownership by certain entities that have traditionally had difficulty gaining access to capital.[139] Likewise, the commenters have not show how the alien ownership limits have

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[134]See *Broadcast Attribution Report and Order* at para. 15 n.35.

[135]See *id.*

[136]Section 13(d)(1) of the Exchange Act, 15 U.S.C.§78m(d)(1).

[137] *See Securities and Exchange Commission v. Savoy Industries, Inc.*, 587 F.2d 1149 (1978), cert. denied, 99 S.Ct. 1227 (1979).

[138]47 C.F.R.§20.6(d)(2).

[139] *Broadcast Attribution Notice*, 10 FCC Rcd at 3623 n.68.

objectives similar to the rules involved in this proceeding.[140]

51. Regarding access to capital, we note that total capital available for cable investment is projected to double in 1999 at $ 24.160 billion from $12.326 billion in 1992.[141] Available capital has steadily grown from $16,731 billion in 1996, $21.396 billion in 1997 and $22.607 billion in 1998. In addition, in 1999, cable operators are projected to have approximately $3.44 billion in surplus capital available.[142] This dramatic increase in cable capital and capital surpluses decreases any cause for concern regarding the availability of capital.[143] Nevertheless, to the extent there remain any capital concerns, as discussed below, we are raising the passive investor benchmark to 20%.

C. Passive Institutional Investor Benchmark

1. Background

52. Our attribution rules do not attribute voting stock interests held by "passive investors" of less than 10%.[144] Passive investors are "investment companies, as defined by 15 U.S.C.§80a-3, insurance companies and banks holding stock through their trust departments in trust

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[140]We also note that the alien ownership restrictions of Section 310(b) of the Communications Act, as amended, apply only to "broadcast or common carrier or aeronautical en route or aeronautical fixed radio station" licenses. 47 U.S.C.§310(b).

[141]Paul Kagan Associates, Inc., Cable TV Finance at 2 (May 28, 1999) (noting that the cable industry is "celebrating two years of financial nirvana").

[142]*Id.*

[143]*See also Broadcast Attribution Report and Order* at para. 14 (finding that the strength of the communications and financial markets alleviated concerns over capital availability).

[144]See 47 C.F.R.§501 Note 2(c).

accounts."[145] In the Attribution Order, we concluded that these entities play passive roles because they lack the interest and the ability to actively participate in the firms in which they invest, and that setting a higher investment benchmark for such investors posed little risk of influence or control[146]

2. Comments

53. Some commenters request that the passive ownership benchmark be raised and the definition of passive investor be expanded. To increase capital availability, Time Warner argues that the threshold should be raised to 20%,[147] and TCI argues that it should be raised to 49%.[148] NCTA argues that the Commission should relax the passive ownership benchmark because passive investors by definition are not involved in a system's core functions and raising the benchmark will increase the flow of capital.[149] For small cable operators, NCTA argues that passive investments should not be attributable at all in order to give them more access to capital.[150]

54. Mediacom, Chase and Comcast argue that institutional investors should be treated as passive investors.[151] Chase argues that institutional investors invest in entities to obtain returns on their equity, not to harm the entities and diminish their profits; therefore, Chase argues that

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[145] *Id.*

[146] *Attribution Order* at para. 32.

[147] Time Warner Comments at 53.

[148] *Id.* at 51.

[149] NCTA Comments at 16; *see also* TCI Comments at 51 (passive investor safeguards will protect the public interest).

[150] NCTA Comments at 19.

[151] Mediacom Comments at 14-15; Comcast Comments at 3.

attribution standards for ownership rules should be distinguished from rules designed to control behavior, such as program access and program carriage.[152] Chase asserts that investment companies should be permitted to control seats of the board so long as they do not control the board and do not participate in the day-to-day operations of the entity in question.[153] Chase urges the Commission to recognize that investors must have some input to reduce the risk of the investment.[154]

3. Discussion

a. The Appropriate Passive Institutional Investor Benchmark

55. For the reasons set forth in the *Broadcast Attribution Report and Order*, we will raise the cable passive investor benchmark to 20%.[155] We believe that the legal and fiduciary requirements that constrain a passive institutional investor will ensure their passivity with respect to the management and operational affairs of a company. In addition, we believe that raising the benchmark is a relatively safe way to increase access to capital while continuing to capture influential interests. We will not raise the benchmark higher than 20%. As we stated in the *Broadcast Attribution Report and Order*, we must act cautiously when relaxing the attribution rules so that the purpose of the rules is not undermined. Based on the record before us in the Broadcast Attribution Proceeding, we found that voting stock held by passive investors could become decisive in proxy disputes, and passive investors accordingly could not be considered equivalent to limited partners

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[152]Chase Comments at 2 n.2, 3-5.

[153]Chase Comments at 8; *see also* Mediacom Comments at 9 (Chase is not actively involved in the management or operations of Mediacom).

[154]Chase Comments at 5.

[155]See *Broadcast Attribution Report and Order* at paras. 17-22. For the text of the new rule, see Appendix A; 47 C.F.R.§76.501.

or non- voting shareholders.[156]

b. Definition of Passive Investors

56. We will not expand the passive investor definition to include other types of investors. We are not convinced that other types of investors lack the interest or the ability to participate actively in companies in which they have invested.[157] This is particularly true of public pension funds, many of which have apparently become increasingly active in proxy fights and other devices to put pressure on management perceived to be under-performing.[158] Furthermore, commercial and investment bank activities do not fall under the same fiduciary restrictions, discussed above, that apply to bank trust departments. In addition, we have not been presented with sufficient evidence thus far to revise our earlier tentative conclusion not to include SBICs and SSBICs in the definition of passive investors.[159] As we have noted, under certain circumstances, these entities are authorized to exercise control over debtor companies for temporary periods.[160] Furthermore, an

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[156] *Id.* at para. 22.

[157] See *Broadcast Attribution Report and Order* at para. 25.

[158] M.J. Roe, *Strong Managers, Weak Owners* 125 (1994). In the *Attribution Order*, we declined to classify pension funds as passive investors based on evidence that pension funds manage their own investments and actively pursue social goals in their investment policies. *Attribution Order*, 97 FCC 2d at 1014-15.

[159] In the *Attribution Order*, we declined to accord passive status to SBICs and MESBICs, noting the absence of compelling reason to alter the 5 percent benchmark for these entities and the fact that while these entities are generally prohibited from assuming control of the companies in which they invest, they are authorized to exercise control over debtor companies for temporary periods under specified conditions. *Attribution Order*, 97 FCC 2d at 1016-17 & n. 45.

[160] Attribution Notice, 10 FCC Rcd at 3631, *citing Attribution Order*, 97 FCC 2d at 1016 & n. 45.

investment advisor, acting on behalf of its client, might exert the same level of influence or control as might the client. Therefore, unlike the categories currently defined as passive investors, we do not find evidence of regulatory or other safeguards ensuring that other types of investors will remain passive. While several commenters favored expanding the definition of the passive institutional investor category, they did not supply persuasive evidence or analysis to support their case and, in particular, to contradict evidence that these institutional investors can be actively involved in the companies in which they invest.[161] Indeed, the record here shows that some classes of institutional investors believe they should have the right to control seats on the board and to be actively involved.[162]

D. Partnership Interests

1. Comments

57. Under the Commission's current attribution rules governing partnership interests, general partners and non-insulated limited partnership interests are attributable, regardless of the amount or percentage of equity held. An exception from attribution applies only to those limited partners who meet the Commission's insulation criteria and certify that they are not materially involved in the management or operations of the partnership's media interests.[163]

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[161]Chase Comments at 5 (urging that investors must have some input in order to protect their investment).

[162]*Id.* at 5, 8.

[163]These "insulation criteria" include the following: (1) the limited partner cannot act as an employee of the partnership if his or her functions, directly or indirectly, relate to the media enterprises of the company; (2) the limited partner may not serve, in any material capacity, as an independent contractor or agent with respect to the partnership's media enterprises; (3) the limited partner may not communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its business;

58. Time Warner argues that the attribution standards applicable to limited partnerships are overly restrictive in that a limited partnership investment no matter how small is attributable unless it is "insulated" under what Time Warner asserts are the Commission's overly-stringent standards.[164] Time Warner states that the Commission should change its insulation criteria to make them consistent with federal and state securities regulations which require that limited partners in "business development companies" be given the right to vote to elect or remove their general partners. In addition, Time Warner argues that the Commission should permit investors to communicate with the partnership about their investments and to enter into arms-length contractual relationships with respect to the partnership's business, as nonvoting or de minimus voting shareholders in corporations are permitted to do, without being attributable.[165] Finally, Time Warner argues that a limited partnership interest of less than 33% should not be attributable in any partnership with at least 20 limited partners if the partnership certifies that the interest holder will not be actively involved in the partnership's media affairs.[166]

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(4) the rights of the limited partner to vote on the admission of additional general partners must be subject to the power of the general partner to veto any such admissions; (5) the limited partner may not vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause as determined by a neutral arbiter; (6) the limited partner may not perform any services for the partnership materially relating to its media activities, except that a limited partner may make loans to or act as a surety for the business; and (7) the limited partner may not become actively involved in the management or operation of the media businesses of the partnership. See *Attribution Reconsideration*, 58 RR2d at 618-20, on recon., 1 FCC Rcd at 802-03.

[164]Time Warner Comments at 55.

[165]*Id.* at 56-57 (giving a multiplicity of limited partners the right to remove a general partner does not give each limited partner significant influence or control).

[166]*Id.* at 57.

59. CU argues that the limited partner insulation exemption should be eliminated because, even though "insulated," limited partners nevertheless exercise some persuasion in partnership affairs that the attribution rules might not capture.[167]

60. Bresnan argues that the Commission should not eliminate its insulated limited partner exception because it would frustrate Bresnan's ability to upgrade its systems.[168] In addition, Bresnan argues that the Commission should apply its "single majority shareholder" exemption to partnerships because a minority shareholder does not have control, Bresnan asserts, over the entity.[169]

2. Discussion

61. For the reasons set forth in the *Broadcast Report and Order*, we find no basis to alter our conclusion that limited partnership interests are distinct from corporate equity voting interests and that our limited partnership insulation criteria are necessary to identify partnership interests that confer influence or control.[170] As we have previously found, partners in a limited partnership have the power, through contract, to determine their respective rights.[171] As a result, the power of a limited partner to influence or control the operations of the part-

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[167]CU Comments at 4.

[168]Bresnan Comments at 20.

[169]*Id.* Bresnan asserts that TCI's 20% general partnership interest in TCA II does not give TCI control over TCA II. Bresnan states that TCA II is governed by a partnership committee of five members, of which three are from TCA and two are from TCA. TCA has the explicit right to manage the day-to-day operations of the partnership and the right to purchase TCI's partnership interest, but TCI does not have the right to purchase TCA's interest. *Id.*

[170]*Broadcast Attribution Report and Order* at paras. 130-133; *see also* Attribution Further Reconsideration, 1 FCC Rcd at 803-04.

[171]*Id.*

nership may not be proportional to the limited partner's equity interest, because the extent of its power may be modified by contract.[172] Thus, the insulation criteria are designed to identify situations within which it is safe to presume that a limited partner will not be materially involved in the media management and operations of the partnership.[173]

62. We decline to loosen the insulation criteria to accommodate widely held limited partnerships, such as "business development companies," that are organized under federal and state laws that require that investors have powers to exert significant influence or control over their partnerships. Like partnerships, these new business entities have contractual flexibility for organizing their management, thereby giving their investors the contractual ability to determine their rights. More importantly, the federal and state laws that regulate business development companies and partnerships may permit and sometimes require those entities to organize themselves in a manner that would enable their members to exert significant influence or control over the partnership. Thus, federal and state laws may fail to provide sufficient assurances that a limited partner lacks the ability to be materially involved in the partnership's media activities, which is the central purpose of the insulation criteria. Accordingly, if an investor in a business development company cannot meet the insulation criteria because of a federal or state law, then the investor has the ability to significantly influence or control the company, which warrants attribution under our rules.[174]

63. Nevertheless, for the horizontal ownership and channel occupancy limits rules,[175] we agree with Time Warner that the insulation criteria

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[172] *Id.*

[173] *Id.*

[174] See *Broadcast Attribution Report and Order* at paras 131-132.

[175] 47 C.F.R. ss 76.503, 76.504.

should be revised. The horizontal ownership and channel occupancy limits are designed to address the ability of one MSO or a group of MSOs, by virtue of their size, to impede the flow of programming from the programmers to consumers.[176] An MSO may extend its ability to affect the programming marketplace when it invests in other cable companies. However, where the MSO is not materially involved in the video-programming activities of a limited partnership, its investment does not extend its national programming power and the concerns of Section 613 are not implicated. In these circumstances where programming is not affected, the current insulation criteria prevent investments between companies whose combination may bring benefits to the public, such as cable broadband and telephony services and competition to the incumbent local exchange carriers or Internet. In order for the limited partnership to benefit from an investor's expertise in these areas, it is necessary to craft insulation criteria that will not prevent the investor from offering its services to the partnership so long as those services are unrelated to the partnership's video-programming activities.

64. Therefore, we will amend the insulation criteria referenced in footnote 163 above for the horizontal and channel occupancy limits rules to provide that a limited partnership interest shall be attributed to a limited partner unless the partnership certifies that this limited partner is not materially involved, directly or indirectly, in the management or operation of the video- programming-related activities of the partnership.[177] In order to qualify for the insulated limited partnership exemption for purposes of these two rules, (1) the limited partner cannot act as an employee of the partnership if his or her functions, directly or indirectly, relate to the video-programming enterprises of the company; (2) the limited partner may not serve, in any material capacity, as an independent contractor or agent with respect to the

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[176]See 47 U.S.C.§613(f)(2)(A).

[177]See Appendix A, 47 C.F.R. ss 76.503, 76.504.

partnership's video-programming enterprises; (3) the limited partner may not communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its video-programming business; (4) the rights of the limited partner to vote on the admission of additional general partners must be subject to the power of the general partner to veto any such admissions; (5) the limited partner may not vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause as determined by a neutral arbiter; (6) the limited partner may not perform any services for the partnership materially relating to its video-programming activities, except that a limited partner may make loans to or act as a surety for the business; and (7) the limited partner may not become actively involved in the management or operation of the video-programming businesses of the partnership. Certifications pursuant to these rules should be served on the Commission as described in the notes to these rules.[178] In order for the Commission to accept the certification, the certification must be accompanied by facts, e.g. in the form of documents, affidavits or declarations, that demonstrate that the insulation criteria are satisfied.

E. Directors and Officers

1. Comments

65. Time Warner makes three requests for clarification of the attribution rules. First, according to Time Warner, alleged "dicta" in Mass Media decisions suggests that the power of a shareholder to appoint a corporate director is in itself an attributable interest.[179] Time Warner

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[178]See Appendix A, 47 C.F.R. ss 76.503, 76.504.

[179]Time Warner Comments at 64 (*citing Applications of Telemundo Group, Inc.*, 10 FCC Rcd 1104 at para. 24 n.8 (1994)).

requests that the Commission expressly disaffirm this type of attributable interest. Second, Time Warner argues that the Commission's recusal standard for the directors and officers of a parent company with regard to a subsidiary is imprecise and overbroad.[180] Third, Time Warner requests that the Commission clarify that, for purposes of Section 310(b) of the Communications Act, an alien entity may hold (1) noninsulated limited partnership interests in a broadcast licensee of up to 20% of equity or (2) indirect noninsulated limited partnership interests in a broadcast licensee of up to 25% of equity. Time Warner also requests that the Commission employ the multiplier to calculate the equity held indirectly by a noninsulated alien limited partner.[181]

2. Discussion

66. Directors and officers are deemed to have an attributable interest in the entities that they serve.[182] We disagree with Time Warner regarding the parameters of the directors and officers attribution rule. A party that has the right to appoint a director to the board of an entity has the ability to influence the entity's conduct by virtue of the director the party selects; thus under the directors and officers rule that party has an attributable interest in the entity.[183] Likewise, if two entities share common directors or officers, or have employees that serve as directors or officers of the other entity, the directors and officers render the entities attributable because of the influence that directors and officers have over an entity.

67. Time Warner argues that the recusal standard for the officers and directors of a parent company with regard to a subsidiary is imprecise

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[180] *Id.* at 65.

[181] *Id.* at 67.

[182] See 47 C.F.R.§76.503(h).

[183] See Telemundo Group, 10 FCC Rcd 1104 at para. 24 n.8

or overbroad.[184] As a general matter, we believe that the recusal standard is appropriate. In addition to the guidance provided by the rule, 47 C.F.R.§76.503(h) (officer or director's duties must be "wholly unrelated to the broadcast licensee or cable television system subsidiary"), the Commission has provided interpretative guidance in a series of decisions.[185] We have stated that parties must take steps to prevent "the recused director from exercising authority or influence in areas that will affect" the subsidiary.[186] For example, we have approved steps where the recused director is not involved in decisions or discussions regarding the particular subsidiary, financial reports are aggregated so that the subsidiary's performance figures are not separately displayed for the director, and reports to the director are redacted to remove information regarding the subsidiary.[187]

68. For purposes of the horizontal ownership and channel occupancy rules,[188] we will amend the matters for which a director or officer must recuse himself or herself in order to achieve the purpose of those rules. As discussed in Section III.D above, the horizontal ownership and channel occupancy rules are designed to place limits on a cable operator's programming power. As long as directors and officers appointed by a partial owner of a cable operator are not involved in the video-programming activities of the partially owned cable operator, the concerns of Section 613 that an MSO's programming power will be extended by its ownership interest are not implicated. Permitting

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[184] See 47 C.F.R.§76.503(h).

[185] *See, e.g., Telemundo Group*, 10 FCC Rcd at 1106; *Turner Broadcasting System, Inc.*, 11 FCC Rcd 19595 at para. 43 (1996); *Craig O. McCaw*, 9 FCC Rcd 5836, 5915-16 (1994), *aff'd sub nom., SBC Communications v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995); *Viacom, Inc.*, 9 FCC Rcd 1577, 1579 (1994).

[186] *Turner Broadcasting*, 11 FCC Rcd 19595 at para. 20.

[187] *Telemundo Group*, 10 FCC Rcd at 1106.

[188] 47 C.F.R. ss 76.503, 76.504.

directors or officers who have knowledge and expertise in areas other than video programming, such as telephony or Internet, to serve with a cable company will benefit the cable company as technologies converge. Therefore, to achieve these objectives for the horizontal ownership and channel occupancy limits rules, appointed or common directors and officers, and the partnership equivalent thereof, shall not be attributable if they do not participate in the video programming activities of either entity.[189] To demonstrate that the officer or director meets the above-stated criteria, the relevant entity shall petition the Commission for a waiver as set forth in the rule.[190]

69. Finally, we will not address Time Warner's request regarding alien ownership of broadcast licensees. The *Cable Attribution Notice* did not raise for comment the attribution rules applicable to those rules; therefore, this is not the appropriate forum to address Time Warner's request.

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[189]See Appendix A, 47 C.F.R. ss 76.503, 76.504.

[190]See Appendix A, 47 C.F.R. ss 76.503, 76.504.

VI. Ordering Clauses

176. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 303 and 612, 613(f)(1)(A)&(B), 616, 623, 628 and 652 of the Communications Act of 1934, as amended, 47 U.S.C. ss 154(i), 303, 532, 533(f)(1)(A)&(B), 536(a), 543, 548(b), 572 and 573, that the amendments to discussed in this *Report and Order* and set forth in Attachment A ARE ADOPTED. These amendments shall become effective 70 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

177. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C.A.§601 et seq.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Appendix A

Rule Changes

Part 76 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 76 -- MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

Section 76.501 Cross-Ownership

1. Section 76.501 is amended by revising Notes 1, 2, 5 and 6 as follows:

Note 1: Actual working control, in whatever manner exercised, shall be deemed a cognizable interest.

Note 2: In applying the provisions of this section, ownership and other interests in an entity or entities covered by this rule will be attributed to their holders and deemed cognizable pursuant to the following criteria:

(a) Except as otherwise provided herein, partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporation will be cognizable;

(b) Investment companies, as defined in 15 U.S.C. 80a-3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 20% or more of the outstanding voting stock of a corporation, or if any of the officers or directors of the corporation are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggre-

gated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

(c) Attribution of ownership interests in an entity covered by this rule that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. [For example, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of "Licensee," then X's interest in "Licensee" would be 25% (the same as Y's interest since X's interest in Y exceeds 50%), and A's interest in "Licensee" would be 2.5% (0.1 x 0.25). Under the 5% attribution benchmark, X's interest in "Licensee" would be cognizable, while A's interest would not be cognizable.]

(d) Voting stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust. An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant entity covered by this rule are subject to said trust.

(e) Subject to paragraph (i) of this Note, holders of non-voting stock shall not be attributed an interest in the issuing entity. Subject to paragraph (i) of this Note, holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

(f)(1) Subject to paragraph (i) of this Note, a limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the media- related activities of the partnership and the relevant entity so certifies. An interest in a Limited Liability Company ("LLC") or Registered Limited Liability Partnership ("RLLP") shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the relevant entity so certifies.

(2) In the case of a limited partnership, in order for an entity to make the certification set forth in paragraph (g)(1) of this section, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the media activities of the partnership. In the case of an LLC or RLLP, in order for an entity to make the certification set forth in paragraph (g)(1) of this section, it must verify that the organizational document, with respect to the particular interest holder exempt from attribution, establishes that the exempt interest holder has no material involvement, directly or indirectly, in the management or operation of the media activities of the LLC or RLLP. The criteria which would assume adequate insulation for purposes of these certifications are described in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 85-252 (released June 24, 1985), as modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986). Irrespective of the terms of the certificate of limited partnership or partnership agreement, or other organizational document in the case of an LLC or RLLP, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners, or other interest holders in the case of an LLC or RLLP, in the management or operation of the media businesses of the

partnership or LLC or RLLP.

(3) In the case of an LLC or RLLP, the entity seeking insulation shall certify, in addition, that the relevant state statute authorizing LLCs permits an LLC member to insulate itself as required by our criteria.

(g) Officers and directors of an entity covered by this rule are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in businesses in addition to its primary media business, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to its primary business. The officers and directors of a parent company of a media entity, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the media subsidiary, and a certification properly documenting this fact is submitted to the Commission. The officers and directors of a sister corporation of a media entity shall not be attributed with ownership of that entity by virtue of such status.

(h) Discrete ownership interests held by the same individual or entity will be aggregated in determining whether or not an interest is cognizable under this section. An individual or entity will be deemed to have a cognizable investment if:

(1) The sum of the interests held by or through "passive investors" is equal to or exceeds 20 percent; or

(2) The sum of the interests other than those held by or through "passive investors" is equal to or exceeds 5 percent; or

(3) The sum of the interests computed under paragraph (i)(1) of this section plus the sum of the interests computed under paragraph (i)(2) of this section is equal to or exceeds 20 percent.

(i) Notwithstanding paragraphs (e) and (f) of this Note, the holder of an equity or debt interest or interests in an entity covered by this rule shall have that interest attributed if the equity (including all stockholdings, whether voting or nonvoting, common or preferred, and partnership interests) and debt interest or interests, in the aggregate, exceed

33 percent of the total asset value (all equity plus all debt) of that entity, provided however that:

(1) in applying the provisions of paragraph (i) of this note to§76.501, §76.505 and§76.905(b)(2), the holder of an equity or debt interest or interests in a broadcast station, cable system, SMATV or multiple video distribution provider subject to§76.501,§76.505, or§76.905(b)(2) ("interest holder") shall have that interest attributed if the equity (including all stockholdings, whether voting or nonvoting, common or preferred, and partnership interests) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value (defined as the aggregate of all equity plus all debt) of that entity; and

(i) the interest holder also holds an interest in a broadcast station, cable system, SMATV, or multiple video distribution provider that operates in the same market, is subject to§76.501,§76.505, or§76.905(b)(2) and is attributable without reference to this paragraph (i); or

(ii) the interest holder supplies over fifteen percent of the total weekly broadcast programming hours of the station in which the interest is held.

(2) For purposes of applying subparagraph (i)(1), the term "market" will be defined as it is defined under the rule that is being applied.

Note 5: Certifications pursuant to this section and these notes shall be sent to the attention of the Cable Services Bureau, Federal Communications Commission, 445 12th Street, N.W. Washington, D.C. 20554.

Note 6: In applying paragraph (a) of§76.501, no minority voting stock interest will be cognizable if there is a single holder of more than 50% of the outstanding voting stock of the corporation in which the minority interest is held, provided however, that an investor that has an interest under the terms of Note 2(i) of this section shall have that interest attributed.

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Section 76.503 National subscriber limits

2. Section 76.503 is amended by adding Note 2 as follows:

Note 1: Attributable Interest shall be defined by reference to the criteria set forth in Notes 1-5 to§76.501 provided however, that:

(a) Notes 2(f) and 2(g) to§76.501 to shall not apply;

(b)(1) Subject to Note2(i) to§76.501, a limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the video programming-related activities of the partnership and the relevant entity so certifies. An interest in a Limited Liability Company ("LLC") or Registered Limited Liability Partnership ("RLLP") shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the video programming-related activities of the partnership and the relevant entity so certifies.

(2) In the case of a limited partnership, in order for an entity to make the certification set forth in paragraph (b)(1) of this section, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the video programming activities of the partnership. In the case of an LLC or RLLP, in order for an entity to make the certification set forth in paragraph (g)(1) of this section, it must verify that the organizational document, with respect to the particular interest holder exempt from attribution, establishes that the exempt interest holder has no material involvement, directly or indirectly, in the management or operation of the video programming activities of the LLC or RLLP. The criteria which would assume adequate insulation for purposes of these certifications are described in the *Report and Order*, FCC No. 99-288, CS Docket No. 98-82 (released October 20, 1999). In order for the Commission to accept the certification, the certification must be accompanied by facts, e.g. in the form of documents, affidavits or declarations, that demonstrate that these insulation criteria are met. Irrespective of the terms of the certificate of limited partnership or partnership

agreement, or other organizational document in the case of an LLC or RLLP, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners, or other interest holders in the case of an LLC or RLLP, in the management or operation of the video-programming activities of the partnership or LLC or RLLP.

(3) In the case of an LLC or RLLP, the entity seeking insulation shall certify, in addition, that the relevant state statute authorizing LLCs permits an LLC member to insulate itself as required by our criteria.

(c) Officers and directors of an entity covered by this rule are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in activities other than video-programming activities, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to the entity's video-programming activities. In the case of common or appointed directors and officers, if common or appointed directors or officers have duties and responsibilities that are wholly unrelated to video-programming activities for both entities, the relevant entity may request the Commission to waive attribution of the director or officer. The officers and directors of a parent company of a video-programming business, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the video-programming subsidiary, and a certification properly documenting this fact is submitted to the Commission. The officers and directors of a sister corporation of a cable system shall not be attributed with ownership of that entity by virtue of such status.

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Section 76.504 Limits on carriage of vertically integrated programming

3. Section 76.504 is amended by deleting paragraph (h) and adding Note 1 as follows:

Note 1: Attributable Interest shall be defined by reference to the criteria set forth in Notes 1-5 to§76.501 provided however, that:

(a) Notes 2(f) and 2(g) to§76.501 to shall not apply;

(b)(1) Subject to Note2(i) to§76.501, a limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the video programming-related activities of the partnership and the relevant entity so certifies. An interest in a Limited Liability Company ("LLC") or Registered Limited Liability Partnership ("RLLP") shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the video programming-related activities of the partnership and the relevant entity so certifies.

(2) In the case of a limited partnership, in order for an entity to make the certification set forth in paragraph (b)(1) of this section, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the video programming activities of the partnership. In the case of an LLC or RLLP, in order for an entity to make the certification set forth in paragraph (g)(1) of this section, it must verify that the organizational document, with respect to the particular interest holder exempt from attribution, establishes that the exempt interest holder has no material involvement, directly or indirectly, in the management or operation of the video programming activities of the LLC or RLLP. The criteria which would assume adequate insulation for purposes of these certifications are described in the *Report and Order*, FCC No. 99-288, CS Docket No. 98-82 (released October 20, 1999). In order for the Commission to accept the certification, the certification must be accompanied by facts, e.g. in the form of documents, affidavits or declarations, that demonstrate that these insulation criteria are met. Irrespective of the terms of the certificate of limited partnership or partnership agreement, or other organizational document in the case of an LLC or

RLLP, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners, or other interest holders in the case of an LLC or RLLP, in the management or operation of the video-programming activities of the partnership or LLC or RLLP.

(3) In the case of an LLC or RLLP, the entity seeking insulation shall certify, in addition, that the relevant state statute authorizing LLCs permits an LLC member to insulate itself as required by our criteria.

(c) Officers and directors of an entity covered by this rule are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in activities other than video-programming activities, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to the entity's video-programming activities. In the case of common or appointed directors and officers, if common or appointed directors or officers have duties and responsibilities that are wholly unrelated to video-programming activities for both entities, the relevant entity may request the Commission to waive attribution of the director or officer. The officers and directors of a parent company of a video-programming business, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the video-programming subsidiary, and a certification properly documenting this fact is submitted to the Commission. The officers and directors of a sister corporation of a cable system shall not be attributed with ownership of that entity by virtue of such status.

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APPENDIX C

Cable Alliances and Partnerships

To assist with our analysis in this proceeding, we asked for comment on the specifics of recently concluded cable transactions, such as cable system partnerships, joint ventures, swaps, transfers, mergers and acquisitions, particularly those transactions announced or consummated in 1997 or thereafter.

For each transaction identified, we asked the commenters to note the percentage and nature (e.g., voting or non-voting, limited or general partnership, insulated or non-insulated, rights of conversion) of each entity's ownership interests; the number of officers, directors, and other key personnel appointed by each entity to a management committee, board or other governing body; and the portion of the equity or debt financing contributed by each entity. In addition, we asked for comment on any authority or power held by each entity to review, veto or otherwise influence the management or operation of the cable systems, including core areas such as budget, personnel, programming, technology and competitive practices.

We note that, since the comments in this proceeding were filed, many of the alliances discussed below have changed.

i. Comcast

Comcast agreed to loan $735,000,000 to Prime Communications, LLC, in exchange for a 10-year note which is convertible to a 90% equity interest in Prime once Prime rebuilds its Washington, D.C. area cable systems. Until the note is converted, Prime will manage and operate its systems.[396] Prime serves approximately 430,000 customers, which under our new ED rule will be attributable to Comcast.

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[396] *Comcast Corporation Enters Into Strategic Relationship with Prime Communications, Press Release* (Dec. 11, 1998).

ii. MediaOne's Partnership with Time Warner

MediaOne holds a 25.5% limited partnership interest in a partnership with Time Warner, Time Warner Entertainment Co., LP ("TWE"). Thus, under the Commission's attribution rules, TWE's 9.6 million subscribers are attributed to MediaOne. MediaOne states that adding TWE's 9.6 million subscribers to the 4.9 million subscribers that MediaOne alone serves raises MediaOne's total number of subscribers to 14.5 million, which is higher than Time Warner's 12 million subscribers.[397] MediaOne states that it cannot avail itself of the "insulated limited partner" exception because one of the key purposes of the partnership was to combine Time Warner and MediaOne's expertise in designing and testing Full Service Networks.[398] MediaOne asserts that it has not exercised any control over the selection of programming on the TWE systems.[399] According to MediaOne, it directly serves only 8% of the nation's cable subscribers, but because the TWE subscribers are attributed to MediaOne under the current rules, MediaOne cannot acquire more than another 2.6 million subscribers without violating the 30% horizontal ownership limits.[400]

iii. TCI's Joint Ventures, Affiliations and Investments[401]]

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[397]FN397. MediaOne Comments at 3. MediaOne's numbers here are not calculated according to the Commission's attribution rules.

[398]*Id.* at 4.

[399]*Id.* at 4.

[400]*Id.* at 5.

[401]On March 9, 1999, TCI merged with AT&T. TCI's cable systems are now owned by AT&T Broadband & Internet Services, Inc ("AT&T Broadband"), an AT&T subsidiary. TCI's programming subsidiary, Liberty Media Group, is now a separate subsidiary of AT&T. Because the comments in this proceeding were filed before the merger, for ease of reference, we will refer to AT&T Broadband as TCI.

As of January 20, 1999, TCI states that, based on our current attribution rules, its cable systems pass 38,757,000 homes.[402]] Based on 95.6 million total cable homes passed, TCI's systems pass 45% of the market. With the exception of its investment in Time Warner, TCI's joint ventures, affiliations and investments described below attribute those entities' subscribers to TCI.

Adelphia *et al.* and Bresnan *et al.* state that each of TCI's affiliates has the option to purchase cable networks from TCI's subsidiary, Satellite Services, Inc. ("SSI"), but is not required to do so.[403]3] SSI purchases the distribution rights for cable program networ[404]] It provides "[m]any of the popular cable networks ... at rates which are lower than those which would otherwise be obtainable."[405] A TCI partner can selectively choose cable networks from SSI's offerings and is free to separately contract for non-SSI services.[406]

a) Time Warner

TCI, through its subsidiary Liberty Media, holds a 10% equity interest in Time Warner.[407] Pursuant to a consent decree with the Federal Trade Commission ("FTC"), Liberty Media exchanged its shares of Time Warner common stock for a separate series of Time Warner common

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[402]Letter to Magalie Roman Salas, FCC Secretary, from Douglas G. Garrett, TCI Senior Regulatory Counsel (Dec. 30, 1998).

[403]Adelphia *et al.* Comments at 8-9; Bresnan *et al.* Comments at 13.

[404]Adelphia et. al Comments at 8.

[405]Adelphia et. al Comments at 8.

[406]*Id.*

[407]Tele-Communications, Inc. 1997 Stockholder Report, Liberty Media Group Assets, at 19.

stock with limited voting rights.[408] Thus, Liberty Media's 10% equity interest in Time Warner represents less than 1% of the voting power of Time Warner's outstanding common stock.[409]

b) Adelphia Partnership

TCI holds a 34.4% interest and Adelphia Communications Corp. holds a 65.6% interest in Parnassos, LP. The partnership serves approximately 465,000 subscribers and passes approximately 700,000 homes. Adelphia has three members and TCI has two members on the five-member Parnassos board. Unanimous consent of the board is required for fundamental decisions such as the purchase/sale of assets, issuance of equity interests, consolidation, mergers, and additional capital calls.[410]0] Adelphia manages the Parnassos partnership for a fee and states that it has managerial control over programming choices, personnel, marketing, and rebuilds. Parnassos purchases programming from SSI.[411]

c) Falcon and Insight Partnerships

TCI holds a 47% interest in Falcon Communications, LP (a partnership with Falcon Holding Group, Inc.) and a 50% interest in Insight Communications of Indiana LLC (a partnership with Insight Communications Co., LP). The Falcon partnership serves approximately 1 million subscribers, and the Insight Partnership serves approximately 320,000 subscribers. The Falcon partnership agreement and the Insight agreement give Falcon and Insight, respectively, the exclusive right to manage their joint ventures with TCI, while TCI retains super majority

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[408]Tele-Communications, Inc. Merger Proxy Statement, Form DEF 14-A (Jan. 8, 1999).

[409]*Id.*

[410]TCI Comments at 42-43; Adelphia *et al.* Comments at 15.

[411]TCI Comments at 42-45; Adelphia *et al.* Comments at 15.

rights to approve fundamental decisio[412]] Of the six- member Falcon Communications, LP, advisory committee, Falcon will have three members, TCI will have two members, and TCI and Falcon will jointly agree on a sixth memb[413] The Insight Communications of Indiana LLCs management committee will consist of three Insight members and two TCI members.[414]14]

d) Lenfest Communications, Inc.

TCI holds a 50% corporate voting equity interest in Lenfest Communications, Inc. ("LCI"). H.F. Lenfest ("Mr. Lenfest") and his three children from whom he holds proxies own and control the remaining 50% of LCI's stock. LCI serves approximately 1 million subscribers. Mr. Lenfest has the right to designate a majority of the board's directors until January 1, 2002, at which time the Lenfest family and TCI will have the right to appoint an equal number of directors to the board. Mr. Lenfest is LCI's president and CEO and is guaranteed these positions until January 1, 2002. LCI states that TCI has no management control according to an agreement with Mr. Lenfest.[415] If LCI shareholders decide to sell their shares, TCI has the right of first refusal.[416] LCI purchases a number of SSI channels, but has negotiated contracts with channels non-affiliated with SSI and has declined to carry cable networks affiliated with SSI due to LCI's insufficient channel capacity.[417]] Although LCI contracted to use TCI's HITS digital pro-

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[412] Adelphia *et al.* Comments at 12, 14.

[413] *Id.* at 12-13.

[414] *Id.* at 14.

[415] *Id.* at 18.

[416] *Id.* at 20.

[417] *Id.* at 18-19.

gramming service, LCI states that it was under no obligation to do so.[418]

e) Peak Cablevision

TCI holds a 66.7% interest in Peak Cablevision, LLP (a partnership with Fisher Communications, LLC). Peak Cablevision serves approximately 112,000 subscribers and passes approximately 179,000 homes. Fisher will manage the Peak partnership for a fee, the four-member board will consist of two TCI members and two Fisher members, and all decisions will be made by a majority vote, except for major decisions, including budgets, which require unanimous approval. TCI provides programming to the partnership through SSI. [419]

f) Intermedia Capital Partners VI LP

TCI and its president Leo Hindery have an undisclosed interest as limited partners in Intermedia Capital Partners VI, LP. [420] Intermedia Capital Management VI, LLC is the general partner and manages the partnership for a fee. Intermedia serves approximately 425,000 subscribers and passes approximately 646,000 homes. The partnership's advisory committee consists of three TCI members, three Intermedia members and three members from the Blackstone Group, a limited partner. The advisory committee and the limited partners are prohibited from taking part in the control, management or operation of the partnership.[421] TCI provides programming to the partnership through SSI. [422]

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[418] *Id.* at 19.

[419] TCI Comments at 46.

[420] *Id.*

[421] *Id.* at 47.

[422] *Id.*

g) Cablevision

Cablevision acquired approximately 800,000 subscribers from TCI in the New York area.[423] In exchange for the subscribers, Cablevision gave TCI a 33% equity interest in Cablevision, but because TCI has class A stock, which has 1/10 the voting power of class B stock, TCI's voting interest is 8.8%.[424] Cablevision's chairman Charles F. Dolan has control over 44.7% of the total voting power, and other Dolan family members hold 36.8% of the total voting power.[425] Cablevision argues that TCI's control is limited in three other ways. First, for class votes, TCI must vote its shares in direct proportion to the votes of non-TCI Class shareholders; thus Cablevision argues that TCI has no independent voting power. Currently there are only four class A directors out of the 15 directors serving on the board. Second, TCI is prohibited from joining a voting group or voting trust and from obtaining beneficial ownership of more than an additional 10% of class A shares. Third, while TCI is entitled to designate up to two class B seats on the board, voting restrictions prohibit it from designating additional directors. Because class B stockholders have the power to appoint 75% of the board, the Dolan family has the ability to appoint a majority of the board.[426] Cablevision states that TCI has no meaningful ability to exercise influence or control over Cablevision's key decisions.[427] Cablevision states that the Federal Trade Commission ("FTC") found that the TCI/Cablevision transaction was not anticompetitive after a review under the Hart-Scott-Rodino Act.[428] Cablevision serves approx-

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[423]Cablevision Comments at 4.

[424]*Id.* at 15.

[425]*Id.* at 15-16.

[426]*Id.* at 16.

[427]*Id.* at 14, 17.

[428]*Id.* at 17.

imately 3.6 million subscribers.[429]

h) Bresnan Communications Group, LP and TCA Cable Partners II

Bresnan Communications Company, LP, and TCI are forming a new partnership, Bresnan Communications Group, LP ("BCG"). The new partnership will serve 615,000 subscribers. Bresnan will be the sole general partner and the managing partner with a 10% equity interest, TCI will have a 50% limited partnership interest and Blackstone Capital Partners III Merchant Banking Fund, LP, will have a 40% limited partnership interest.[430]

TCA Cable TV, Inc. and TCI formed a partnership, TCA Cable Partners II ("TCA II"), in which TCA holds an 80% general partnership interest, and TCI holds a 20% general partnership interest.[431] The partnership serves approximately 300,000 subscribers. A committee consisting of three TCA members and three TCI members governs TCA II. Management and operation decisions require a majority vote of the committee, while major matters require unanimous approval.[432] Bresnan and TCA argue that, despite TCI's equity involvement, TCA and Bresnan control the budgets, make the personnel decisions, and make programming decisions without TCI mandating any particular carriage.[433] TCI states that TCA manages the day-to-day operations of the general partnership for a fee, and that TCI provides programming

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[429]TCI Comments at 44.

[430]Bresnan *et al.* Comments at 3.

[431]TCI Comments at 49.

[432]Bresnan *et al.* Comments at 3-4 (major matters include fundamental changes to the partnership, significant purchases or sales of assets, and mergers, dissolution or bankruptcy).

[433]*Id.* at 13.

to the TCA II partnership through SSI for a fee.[434]

[434]TCI Comments at 49-50.

Statement of Commissioner Harold W. Furchtgott-Roth, Concurring in Part and Dissenting in Part

In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Review of the Commission's Cable Attribution Rules, CS Docket No. 98-82.

I respectfully dissent from the adoption of these cable attribution rules. I agree, however, with certain decisions regarding cable reform. I thus dissent in part and concur in part in this *Report and Order.*

General Attribution Standards

The instant cable attribution rules are based primarily on the newly revised broadcast attribution rules. See supra at para. 11 (incorporating by reference the reasoning set forth in the *Broadcast Attribution Report and Order*). Those rules are, with a few exceptions, imported into the instant context.

For the reasons that I gave in my dissent from the broadcast attribution rules, I must also dissent from these counting standards. See Statement of Commissioner Harold W. Furchtgott-Roth, Dissenting in Part and Concurring in Part, *In the Matter of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. 94-150; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51; Reexamination of the Commission's Cross- Interest Policy, MM Docket No. 87-154* (rel. Aug. 6, 1999). In short, I believe that we should have taken these opportunities to simplify our attribution rules, instead of creating additional layers of regulation such as the equity- debt-plus test and reaching into heretofore uncharted areas such as pure debt instruments.[1]

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[1] I would also have allowed for *full* transferability of the interests grandfathered under this *Report and Order. Cf. supra* at para. 136.

With particular respect to the changes in the insulation criteria for partnerships, I am sympathetic to the concerns that motivate the Commission. I would prefer to address policy questions in the substantive rule on the horizontal limit, however, not in the context of the attribution rules. I fear that the "materially involved in programming activities" test will prove too subjective to be efficiently applied and enforced.

I am also troubled by the elimination of the single majority shareholder exception. As I made clear in the Broadcast Attribution Order, this rule provides at least some safe harbor to regulated entities in terms of attribution. Against the backdrop of our vastly complicated attribution rules, this exception -- whether or not I would have created it in the first instance -- operates to provide at least one clear instance where interests will not be attributable. Unless we intend to start from scratch and come up with a streamlined attribution system, I think we should retain the single majority shareholder exception.

In this regard, I must note, again, a yawning inconsistency between the broadcast item and this one: while we generally adhere to the broadcast attribution framework for cable, the Commission departs from that framework for the single majority shareholder rule in particular. If the policy reasons animating the rule are persuasive in broadcast, then they ought to work equally well here -- especially given that the Commission states that the industries are not so different that different attribution rules are needed, as noted above. I see no rational justification for retaining this exception for broadcasters but repealing it for cable operators, and I do not think the Order provides one.

Cable Reform Issues

I agree with the Commission's definition of the term "affiliate" for purposes of the LEC effective competition provision of section 623(1). See supra at paras. 120-125. In particular, while the Title I definition does not control in this context, I think it wise to exercise our discretion in light of Congress' definition, as the Commission does. I thus join in

this decision. I would have used the same test, however, for purposes of both the competing provider provision of section 623(l) and the cable-telco buy-out rule, cf. supra at paras. 126-132, and thus dissent from that decision.

STATEMENT OF COMMISSIONER GLORIA TRISTANI, DISSENTING IN PART

In the Matter of Implementation of the Cable Television Consumer Protection andCompetition Act of 1992, Implementation of the Cable Act Reform Provisions ofthe Telecommunications Act of 1996, and Review of the Commission's CableAttribution Rules, CS Docket Nos. 98-82 and 96-85

I dissent from the majority's decision to modify the insulation criteria for limited partnerships and to narrow the attribution standard for officers and directors. These changes are ill-conceived, arbitrary and will prove unworkable in practice.

First, the majority departs from established precedent without adequate explanation. In adopting the broadcast attribution standard for purposes of Section 613, the Commission found:

> [T]he objectives of the broadcast attribution model are consistent with our goals in establishing ownership standards for subscriber limits. In this regard, the broadcast attribution rules focus on ownership thresholds that enable a broadcast licensee to influence or control management or programming decisions. We believe these same issues are also relevant to addressing the concerns at issue in this proceeding relating to the ability of cable operators to unduly influence the programming marketplace.[1]

Just last year, the Commission reiterated these views on reconsideration.[2]

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[1] *See Second Report and Order,* 8 FCC Rcd 8565, 8581 (1993) (emphasis added). The Commission made a similar finding with respect to the channel occupancy limits. *Id.* at 8592.

[2] *See Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits,* 13 FCC Rcd 14462 (1998).

Thus, the Commission has repeatedly recognized that it is one entity's ability to influence or control the management or programming decisions of another entity that implicate the concerns of Section 613. The majority, however, acts as if it is writing on a blank slate by ignoring the ability to influence or control a partnership's management and focusing only on programming-related decisions. The majority does not claim that the broadcast criteria, affirmed by the Commission only two months ago, are wrong.[3] But nor does the majority attempt to explain why our prior precedent is wrong - i.e., why the broadcast attribution criteria really do not address the same issues regarding influence and control over management and programming decisions at issue here. Indeed, the majority would find any such attempt difficult, since, in enacting Section 613, Congress expressed many of the same competition and diversity concerns that underlie our broadcast ownership rules.[4]

The arbitrariness of the majority's decision is further evidenced by its failure to apply its new rules across-the-board. As noted above, the majority does not argue for a change in the broadcast attribution rules. Nor does the majority change the attribution criteria that apply to our other cable rules -- including the cable/SMATV cross-ownership ban, the cable-telco buy-out prohibition, and the competing provider prong of the effective competition test - that apply the broadcast attribution standard. Nor does the majority explain, if programming decisions are the only concern under Section 613, why it restricts its decision to limited partnerships rather than applying it to all corporate structures.

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[3] *See Review of the Commission Regulations Governing Attribution of Broadcast and Cable/MMDS Interests*, FCC No. 99-207 (rel. Aug. 6, 1999).

[4] For instance, Congress believed that unfair practices by large cable companies "could discourage entry of new programming services, restrict competition, impact adversely on diversity, and have other undesirable effects on program quality and viewer satisfaction." H.R. Rep. No. 102-628 at 43 (1992). Similarly, in express legislative findings, Congress determined that the cable industry's concentration posed potential "barriers to entry for new programmers and a reduction in the number of media voices available to consumers." 1992 Act, Sec. 2(a)(4), 106 Stat. 1460.

For instance, the majority does not explain why we should continue to attribute the interests of passive institutional investors, if those investors remove themselves from programming-related activities. If the attribution rules are changed for purposes of limited partnerships under Section 613, logically either the same revisions should apply to these other rules, or a good reason must be advanced why they should not. The majority does neither.

Finally, I fear that the majority's belief that "programming activities" can be neatly cordoned off from other management functions is illusory. In the real world, the ability to influence a partnership's core business activities inevitably involves the ability to at least indirectly affect the various activities, such as programming, in which the partnership is involved. Until today, the Commission has always recognized this common sense proposition. In particular, the Commission has always recognized that the potential influence of officers and directors is significant, and should be attributable to a broadcaster or cable operator whenever these individuals' duties relate to the media activities of the company.[5] Now, however, we are putting officers and directors in the untenable position of determining, on the fly, whether a particular budgetary or marketing decision improperly involves them in "programming-related activities." Worse, the public's right to the competition and diversity benefits of Section 613 depends on them making the right decision. The public interest should not hang by so thin a reed.

For these reasons, I dissent from today's decision to the extent it amends our attribution rules governing limited partnerships, officers and directors.

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[5] *See, e.g., Report and Order*, 97 FCC2d 997 (1984). 1999 WL 958602 (F.C.C.), 14 F.C.C.R. 19,014, 14 FCC Rcd. 19,014, 17 Communications Reg. (P&F) 1104.

IN THE MATTER OF IMPLEMENTATION OF SECTION 11(C)
OF THE CABLE TELEVISIONCONSUMER
PROTECTION AND COMPETITION ACT OF 1992
Horizontal Ownership Limits
MM Docket No. 92-264
FCC 99-289

Adopted: October 8, 1999 Released: October 20, 1999

THIRD REPORT AND ORDER

By the Commission: Commissioner Furchtgott-Roth concurring in part, dissenting in part and issuing a statement; Commissioner Tristani approving in part, dissenting in part and issuing a statement.

I. INTRODUCTION

1. This *Third Report and Order* resolves the issues regarding Section 76.503 of our rules (the "horizontal ownership rules")[1] on which the Commission sought further comment in its *Second Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking* ("*Second Order on Reconsideration*" and "Further Notice") issued in this proceeding.[2] In the *Second Order on Reconsideration*, the Commission denied petitions to reconsider the horizontal ownership rules, which were adopted pursuant to Section 613 of the Communications Act[3] in the Second Report and Order issued in this proceeding.[4]

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[1]47 C.F.R.§76.503.

[2]*In re Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Limits*, MM Docket No. 92- 264 (rel. June 26, 1998).

[3]Section 613 was adopted as Section 11(c) of Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 47 U.S.C.§533(f)(1)(A).

[4]*In re Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Limits, Second Report and Order*, MM. Docket No. 92-264, 8 FCC Rcd 8565 (1993).

Section 613 of the Communications Act required the Commission to "prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such a person, or in which such a person has an attributable interest."[5] In the Second Report and Order, the Commission promulgated horizontal ownership rules which provide that "no person or entity shall be permitted to reach more than 30% of all homes passed nationwide through cable systems owned by such person or entity or in which such person or entity holds an attributable interest."[6] In addition, the Commission decided to permit cable systems to reach up to 35% of all homes passed nationwide "provided [that] the additional cable systems, beyond 30% of homes passed nationwide, are minority-controlled" (the "minority-control allowance").[7]

2. In the *Second Order on Reconsideration*, the Commission also continued its stay of the effective date of the horizontal ownership rules pending a decision by the United States Court of Appeals for the District of Columbia Circuit on challenges to the horizontal ownership rules and Section 613.[8] The Commission decided that any parties over the horizontal limit must come into compliance with the rules within 60 days of a judicial decision upholding the statute and the rules.[9] However, in order to facilitate monitoring of a cable multiple system operator's ("MSO") ownership interests, the Commission lifted the stay

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[5]47 U.S.C.§533(f)(1)(A).

[6]47 C.F.R.§76.503(a). Under 47 C.F.R.§76.503(f), an "attributable interest" is defined by reference to the criteria set forth in the Notes to the Commission's cable cross-ownership rules, 47 C.F.R.§76.501.

[7]47 C.F.R.§76.503(b). For purposes of this regulation, "minority-controlled" is defined as "more than 50% owned by one or more members of a minority group." 47 C.F.R.§76.503(d).

[8]*Second Order on Reconsideration* at para. 75

[9]*Id.* at para. 77.

insofar as it applied to the information submission provisions of 47 C.F.R.§76.503(c).[10]

3. The rules and the statute were challenged in two different forums. In *Daniels Cablevision, Inc. v. United States,* the United States District Court for the District of Columbia held that Section 613(f)(1)(a) violates the First Amendment.[11] The Daniels court also decided that, because "there is substantial ground for difference of opinion" as to the constitutionality of the underlying statute, it would stay its proceedings and the issuance of any relief to the plaintiffs pending appeal. Time Warner then challenged the horizontal ownership rules in the District of Columbia Circuit in *Time Warner Entertainment Co., L. P. v. FCC.*[12] In August 1996, the District of Columbia Circuit consolidated the appeal of *Daniels* with *Time Warner.*[13] The District of Columbia Circuit held the consolidated appeals in abeyance pending the Commission's decision on the petitions for reconsideration.[14] Once the Commission issued the *Second Order on Reconsideration,* the District of Columbia Circuit lifted its stay on its consideration of the consolidated *Daniels* and *Time Warner* proceedings. The appeal is currently pending.

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[10]The existing certification requirements of Section 76.503(c) are triggered when any person or entity that holds an attributable interest in cable systems reaching 20% or more of homes passed nationwide acquires additional cable systems. In light of the stay of enforcement of the horizontal ownership rules, the Commission relieved MSOs of the Section 76.503(c) requirement that the MSO certify that no violation of the 30% limit will occur as a result of an acquisition. Until the stay is lifted, the certification should only specify the incremental change the acquisition makes in terms of the 30% of household passed standard, i.e. specifying the ownership in terms of homes passed before and after the acquisition is complete. *Second Order on Reconsideration* at para. 76.

[11]*Daniels Cablevision, Inc. v. United States,* 835 F. Supp. 1, 10 (D.D.C. 1993), *aff'd in part, rev'd in part, Time Warner Entertainment Co., LP v. FCC,* 93 F.3d 957 (D.C. Cir. 1996).

[12]*Time Warner Entertainment Co., L P v. FCC,* No. 94-1035 (D.C. Cir. 1994).

[13]*Time Warner Entertainment Co., LP v. FCC,* 93 F.3d 957, 979-80 (D.C. Cir. 1996).

[14]*Time Warner,* 93 F.3d at 979-80.

4. In the *Further Notice,* we requested comment on whether 30% remains the appropriate horizontal limit in light of any changes in market conditions since 1993, when the *Second Report and Order* was issued.[15] We sought comment on three specific issues. First, the current horizontal rules are based on the number of homes that a cable system passes (i.e., homes that could possibly subscribe to the cable system) rather than the cable system's actual number of subscribers. We asked whether we should amend the rules to base calculations on actual subscribers. Second, the horizontal ownership limits currently are calculated based on an MSO's share of cable subscribers. Given the growth of non-cable multiple video programming distributors ("MVPDs"), we asked for comment on whether the calculations should take into account the presence of all MVPD subscribers rather than cable subscribers alone. Third, we sought comment on the constitutionality of the minority-control allowance under *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995) and whether there were alternative minority policies that might satisfy *Adarand's* standards.[16]

5. After analyzing the statute and the comments filed in response to the *Further Notice,*[17] we conclude that the following changes should be made in the rules:

- The calculation of the horizontal limit should be based on cable subscribers served rather than on cable homes passed;

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[15] *Further Notice* at para. 32. In *Second Report and Order,* we stated that we intended to review the horizontal limits every five years in order to determine whether they were still reasonable under new market conditions and continued to meet their policy objectives. *Second Report and Order* at para. 40.

[16] *Further Notice* at paras. 78-88.

[17] A list of commenters and the abbreviations used to refer to them herein is attached as Appendix A.

- The limit should include consideration of all MVPD subscribers rather than just cable subscribers;

- The number of subscribers a single entity is permitted to reach through cable systems it owns or in which it has an attributable interest should be limited to 30 percent of MVPD subscribers in the United States.

- An operator's horizontal share should not include cable subscribers that it serves through means other than through "incumbent cable franchises" so that a system operator may grow over the limit by overbuilding other incumbent cable operators; and

- The "minority-control" allowance in the existing rules should be eliminated.

6. These changes will make the rules easier to understand and implement, recognize the dynamic factors relating to the growth of the MVPD market, and allow cable ownership interests to increase as competition in the market increases. The new 30% rule, because it is now a share of MVPD subscribers rather than on cable subscribers alone, is effectively the same as a 36.7% cable subscribers limit using the measurement system in the previous rules. The minority-control allowance is being deleted in light of the fact that no party filed comments on this issue to argue that the allowance is effective, should be retained or might be beneficial, and in light of the possible constitutional issues that the allowance raised. Finally, we deny the request of one of the petitioners that we permit any transaction under contract prior to the release of the *Further Notice* to be continued regardless of the new rules. We deny requests to lift the stay of our horizontal ownership rules and reiterate that the rules will become effective immediately upon the court's issuance of a mandate upholding Section 613 and the rules. We decide that affected parties that are in violation

of the rules at such time must comply with the rules within 180 days after the court issues its mandate.

II. Background

7. Section 613(f) of the Communications Act requires the Commission to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest.[18]

8. Congress did not direct the Commission to use a mathematical formula in determining the horizontal limits. Rather, Congress directed in Section 613(f)(2) that, the Commission must consider and balance, among other public interest objectives, seven specific public interest guidelines in determining the appropriate horizontal limits. These public interest guidelines are:

> (A) ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the programmer to the consumer;
>
> (B) ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems or do not unreasonably restrict the flow of video programming of affiliated video programmers to other video distributors;
>
> (C) take particular account of the market structure, ownership patterns, and other relationships of the cable industry, including the nature and market power of the local franchise, the joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests;
>
> (D) account for any efficiencies and other benefits that

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[18] 47 U.S.C.§533(f)(1)(A).

might be gained through increased ownership or control;

(E) make such rules and regulations reflect the dynamic nature of the communications marketplace;

(F) not impose limitations which would bar cable operators from serving previously unserved rural areas; and

(G) not impose limitations which would impair the development of diverse and high quality programming.[19]

9. The 1992 Cable Act and its legislative history indicate heightened Congressional concern over horizontal concentration among cable operators. Witnesses at the congressional hearings, including representatives of the MSOs themselves, testified to the need for cable horizontal ownership limits to preserve competition and protect the public interest.[20] Congress was concerned that the concentration of cable systems in the hands of a few "media gatekeepers" could potentially bar entry to new programmers and reduce the number of media voices available to consumers.[21]

10. However, Congress also recognized that multiple system ownership could provide benefits to consumers. The *House Report* stated that cable industry consolidation had benefited consumers by allowing efficiencies in the administration, distribution and procurement of programming, and also noted that concentration of cable operators could promote the `introduction of new programming services by

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[19] 47 U.S.C.§533(f)(2)(A)-(G).

[20] *See, e.g., Report of the Senate Committee on Commerce, Science and Transportation*, S. Rep. No. 92, 102d Cong., 1st Sess. 34 (1991) ("*Senate Report*") (testimony of John Malone, TCI Chairman, regarding need for cable horizontal ownership limits).

[21] 1992 Cable Act, Section 2(a)(4); *Senate Report* at 32-33; see Section 613(f)(2)(G) (directing the Commission to impose no rule that would impair the development of diverse and high quality programming); *see also Report of the House Committee on Energy and Commerce*, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 43 (1992) (diversity of information sources) ("*House Report*").

providing capital and a ready subscriber base for new services.[22] The *House Report* also observed that large cable MSOs can take competitive and programming risks that smaller operators cannot.[23] Similarly, the *Senate Report* acknowledged that horizontal concentration could create efficiencies from lower transaction costs in carriage negotiations between programmers and cable operators.[24]

11. In the *Second Report and Order*, the Commission adopted a horizontal ownership limit prohibiting any person from having an attributable interest in cable systems that in the aggregate reach more than 30% of cable homes passed nationwide. We found that this 30% ownership limit struck the proper balance between: (1) ensuring that the structure of the cable industry nationwide limited the possibility that large cable MSOs might exercise excessive market power in the purchase of video programming; and (2) ensuring that the majority of MSOs could

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[22] *House Report* at 43.

[23] *Id.*

[24] *Senate Report* at 33. Beginning in 1994, the Commission has issued annual reports on the status of competition in the delivery of video programming. In these annual Competition Reports, the Commission has noted the potential benefits as well as the potential competitive concerns of increased national horizontal concentration among cable MSOs. *See First Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 94-235, CS Docket No. 94-48, 9 FCC Rcd 7442 at paras. 148-155 (1994) ("*1994 Competition Report*"); *Second Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 95-491, CS Docket No. 95-61, 11 FCC Rcd 2060 at paras. 131, 146 (1995) ("*1995 Competition Report*"); *Third Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 96-496, CS Docket No. 96-133, 12 FCC Rcd 4358 at paras. 138-139 (1997) ("*1996 Competition Report*"); *Fourth Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 97-423, CS Docket No. 97-141 at paras. 140-14, 149 (rel. Jan. 13, 1998) ("*1997 Competition Report*"); *Fifth Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 98-335, CS Docket No. 97-141 at pa ras. 152-157 (rel. Dec. 23, 1998) ("*1998 Competition Report*").

continue to expand and benefit from the economies of scale necessary to encourage investment in new video programming services, diverse program offerings, and the deployment of advanced cable technologies.[25] In order to promote diversity of ownership, we also adopted the minority-control allowance, which allows an MSO to reach an additional 5% of homes passed by cable nationwide if these homes are reached by cable systems that are more than 50% owned by one or more members of a minority group.[26]

III. Basis for the Rules

12. Congress directed the Commission to establish horizontal rules; yet in response to the Notice in this proceeding and in the course of the judicial proceedings relating to Section 613, a number of commenters make arguments that, while sometimes couched as pleas for a higher limit, appear to challenge the legitimacy and rational basis of any regulations of the type Section 613(f) requires the Commission to adopt. They argue:

- that increases in channel capacity, through system upgrades and the introduction of digital channels, reduce the practical need as well as the ability of operators to select among alternative content sources;[27]

- that other rules, including mandatory broadcast signal carriage, channel occupancy, leased access, and public access rules, eliminate the need for ownership limits that are also designed to promote programming compe-

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[25] *Second Report and Order* at para. 25; *Second Order on Reconsideration* at paras. 37-42.

[26] *Second Report and Order* at para. 28.

[27] See, e.g., NCTA Comments at 9; TCI Comments at 26-27; Time Warner Comments at 17-18.

tition and content diversity;[28]

- that cable system operators as purchasers of programming content for their subscribers are bound by marketplace forces so that they acquire only that product which their subscribers demand and there is no evidence that cable operators have ever used their editorial discretion to deny an outlet for unorthodox or unpopular speech;[29]

- that, if any problems exist in this area, they can be addressed through ordinary antitrust enforcement processes.[30]

We are not persuaded that these arguments are responsive to Congress' concerns in adopting Section 613(f).

13. With respect to the channel capacity argument, system operators are implicitly suggesting that increased capacity translates into an increased demand for programming. This change in the supply and demand relationship between purchasers and sellers of programming would, it appears they are arguing, tend to mitigate concerns that are based on the buying (monopsony) power of system operators.

14. In most markets, a single incumbent cable operator is likely to have more than 80% of the multichannel video distribution market. Although calculations of market power are almost always complex, a frequently cited compendium of monopoly cases concludes that "market share in excess of 70% is almost always deemed sufficient to

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[28]See, e.g., TCI Reply Comments at 8, 12.

[29]TCI Comments in Docket 98-92 at 40 ("Investors will not tolerate actions designed to foreclose specific viewpoints or opinions merely for ideological purposes.").

[30]Adelphia *et al.* Comments at 29; Bresnan Comments at 26; TCI Comments at 67; Time Warner Comments at 23; Time Warner Reply Comments at 15.

support an inference of monopoly power, although that inference may be overcome by other evidence."[31] The cable television industry has become, in the words of the 1992 Cable Television Consumer Protection and Competition Act "A dominant nationwide video medium."[32] On the other hand, the programming supply market is extremely competitive with increases in cable channel capacity, with the growth rate of new programmers rapidly outpacing the growth of new channels.[33] The Commission's 1998 Competition Report found that there were 245 national cable networks and that 65 new cable networks were planned to launch in the near future.[34] The decreasing marginal value of additional channels, the more limited exposure these channels receive by virtue of their placement on digital or other tiers to which subscribership is restricted and the associated difficulties of attracting an audience base to support advertising sales all tend to suggest that capacity increases have not had the consequence suggested and that channel expansion has not negated the Congressional concerns. Cable operators still have the power to decide which cable networks will

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[31] *I Antitrust Law Developments* (Third) 213-214 (1992) (citations omitted).

[32] Public Law 102-385,§2(a)(3). *See also 1998 Video Competition Report* at para. 6 ("We find that cable television continues to be the primary delivery technology for the distribution of multichannel video programming and continues to occupy a dominant position in the MVPD marketplace.").

[33] *See* comments filed in *In re Carriage of the Transmissions of Digital Television Broadcast Stations, Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120 ("Digital Carriage"); *e.g.*, Adelphia Digital Carriage Comments at 21 ("Even if technological advances result in a greatly increased number of channels on cable systems, the number of programmers competing for carriage on those channels increases at a faster rate."); NCTA Digital Carriage Comments at 47 ("[I]ncreased channel capacity continues to be outpaced by an increased number of national cable program networks."); Encore Digital Carriage Comments at 5; America's Voice Digital Carriage Comments at 14 (number of competitors will outstrip available channel space); Weather Channel Digital Carriage Comments at 13-15.

[34] *1998 Competition Report* at para. 152.

"make it" even as channel capacity grows.[35]

15. The suggestion that other statutory provisions and Commission rules effectively address the same concerns we find equally unpersuasive. We believe Congress passed Section 613 to address specific concerns regarding the development of the video-programming market. Since Congress was aware of the interplay between the horizontal rule and the other rules addressing programming, it is clear that Congress intended for all the rules to work together in a complementary fashion. In any event, we do not believe that the goals of Section 613 are addressed by other statutory provisions. The channel occupancy rules[36] adopted pursuant to Section 613 of the Communications Act are intended to address only that programming that is controlled through direct ownership rather than through purchase and apply only to channel capacity up to 75 channels. The leased access rules,[37] while intended to address some of the same kinds of concerns, require the programmer to pay for carriage, a model which thus far has not resulted in any significant amount of nationally distributed programming content being made available to the public. The must-carry requirement[38] applies only to broadcasters, not to other unaffiliated programmers. Moreover the content of the broadcast stations that are carried, even when carried pursuant to mandatory obligations, is not totally divorced in terms of ownership and editorial voice from the cable systems involved. There are significant common ownership ties between a number of the broadcast networks involved and cable television system operators, including for example, significant AT&T (Liberty) ownership interests in News Corp. (the Fox networks), Time

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[35]See *Senate Report* at 33 ("[L]arge MSOs have the market power to determine what programming services can 'make it' on cable.").

[36]47 C.F.R.§76.504.

[37]47 C.F.R.§76.970 et seq.

[38]47 C.F.R.§76.55 et seq.

Warner and MediaOne ownership in The WB network, AT&T (Liberty) ownership in Telemundo, and Comcast and AT&T interests in QVC and HSN. These statutory based requirements thus share common objectives with the horizontal rules and function in a mutually supportive fashion with them but the contention that they are less restrictive methods of accomplishing the same substantive result is not correct. None of these rules fully address the core concern of national programming content diversity to which the horizontal limits are directed.

16. The Commission specifically considered how the behavioral rules interact with the horizontal ownership rules when it adopted the rules in this proceeding.[39] The limit is a structural complement to the other access provisions.[40] Thus, for example, it was explained that the horizontal ownership rules limit the potential for anticompetitive abuses of purchasing power in areas outside of the core areas covered by the program access rules, such as programming contracts between cable operators and non-vertically integrated programmers or contracts involving programming that is not delivered to cable operators via satellite. In addition, structural regulations generally are more easily enforced and their violation more easily detected than conduct regulations. We recognize that a large market share does not in and of itself indicate that a firm or a collection of firms has the ability to exercise market power or engage in anticompetitive behavior.[41] The cable operators have presented no new arguments in response to the *Further Notice* that would alter these findings.

17. The suggestion that cable system operators are somehow involved in content decisions only as somewhat mechanical purchasing agents

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[39] *Second Report and Order* at para. 26; *Second Order on Reconsideration* at para. 42.

[40] 47 U.S.C.§628; 47 C.F.R.§76.1000 et seq.

[41] *See, e.g., In re Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier,* 11 FCC Rcd 3271 (1995). We also recognize that the courts have generally found that a firm can not successfully obtain a monopoly with less than a 30% market share. *Antitrust Law Developments* (Fourth) 298-99 and cases cited therein.

for their subscribers, without independent discretion over the nature of that product, is equally unavailing as a response to the concerns reflected in Section 613. Because there are more programming services available for distribution than there are cable channels to be used for distribution, systems operator inevitably must make judgments as to which services will be carried. Marketing and other economic considerations that involve both the desire to satisfy consumer demands and independent profit calculations certainly play a major role in programming distribution decisions. But there would also seem to be little doubt, especially when the value of programming content may be difficult to determine in advance of its distribution, that issues of judgment, showmanship, social conscience, and personal taste are also involved.[42] The cable television industry has programming expenditures of almost eight billion dollars annually.[43] If these expenditures were allocated evenly across the industry, a firm with 30% of the market would pay $2.5 billion annually for programming, making it one of the largest purchasers of entertainment programming in the world.

18. With respect to the argument that ordinary antitrust policies and enforcement are sufficient to address any legitimate issues raised, we fail to understand why the statutory provisions and policies incorporated into antitrust law should be favored over the more targeted legislative mandate incorporated in Section 613. We agree with Ameritech that, if Congress had intended for us to rely on an antitrust analy-

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[42]Cable operators frequently associate themselves with programming content that reflects well on their standing in the community but they have an equal ability to discourage carriage of popular content that does not suit their tastes. *See e.g., Broadcasting and Cable*, April 1, 1996, at page 14 regarding the decision of TCI to cease carrying one particular type of programming and the explanation of the desirability of doing so notwithstanding the adverse economic consequences. In this article, the company official who made the decision not to carry the program was quoted as stating, "I hope this costs us money because I think the company needs to know there's a price to be paid for taking a stance."

[43]NCTA Cable Television Developments, Fall 1998/Winter 1999.

sis by itself, it would have directed us to do so or would not have adopted Section 613.[44] Instead, Congress directed that the Commission, in setting the horizontal limit, consider "among other public interest objectives" seven specific factors, none of which involves an antitrust analysis.[45] Indeed, in enacting Section 613, Congress was aware that the cable industry at that time was far from being concentrated under a traditional antitrust analysis assuming a national market for cable competition, but nevertheless empowered the Commission to enact horizontal limits using a public interest analysis.[46] The *House Report* stated that a traditional antitrust analysis should not be the "sole measure of concentration in media industries:"

> Both Congress and the Commission have historically recognized that diversity of information sources can only be assured by imposing limits on the ownership of media outlets that are substantially below those that a traditional antitrust analysis would allow .... The Committee believes that concentration of media presents unique problems that must be considered by

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[44]Ameritech Reply Comments at 7 ("The Department of Justice must enforce the antitrust laws but the Commission must effectuate the policies of the Communications Act.").

[45]See Section 613(f)(2) (A)-(G).

[46]There are two prevailing measures of market concentration -- the four firm concentration ratio ("Four Firm Ratio") and the Hirfindahl-Hirschman Index ("HHI"). The Four Firm Ratio measures the percentage of the market captured by the four largest companies in the market. The HHI reflects the distribution of market share among all firms in a given market, giving proportionately greater weight to the market shares of the larger firms. A market is generally considered concentrated when one firm, or a small group of firms, has a sufficient share of the market to exercise power over it. The Justice Department considers an industry concentrated when the HHI exceeds 1800 (although an HHI that exceeds 1000 prompts further evaluation) or when the four firm ratio exceeds 50%. According to the 1992 *House Report*, the HHI for the top 20 MSOs was 491 and the Four Firm ratio for the largest MSOs was 36%, well below the Justice Department's threshold. See *House Report* at 42.

the Commission.[47]

19. In sum, we do not find persuasive arguments that the concerns leading to the adoption of Section 613 are adequately addressed by market forces or technical changes, are not significant enough to warrant remedial action, or are properly addressed through other regulatory mechanisms.

IV. Using Homes Passed or Actual Subscriber Numbers to Calculate the Horizontal Limit

A. Background

20. The rules adopted in the *Second Report and Order* were based on a formula that related homes passed by an individual cable operator to the total homes passed by all cable operators nationwide.[48] We stated that a homes-passed standard would calculate a more stable number than a subscribers-based system because subscriber numbers fluctuate more often than homes passed.[49] In addition, we noted the arguments by some commenters that a subscriber-based standard might deter a cable operator from adding additional subscribers within its current systems as the operator approached the limit.[50] In the *Further Notice,*

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[47] *House Report* at 42. To the extent commenters are simply urging that the rules we adopt should be informed by an antitrust type of analysis, we note that no party has provided a specific analytical framework whereby this might be accomplished unless it is to suggest that the aggregation of interests within the cable industry does not pose an antitrust concern. Because cable operators are frequently monopolists in their local area, traditional horizontal analysis may not find harm in mergers. To the extent that is the case it reinforces, rather than undermines, the need for a separate analysis based on the standards set forth in Section 613.

[48] 47 C.F.R.§76.503(a).

[49] *Second Report and Order* at para. 24.

[50] *Id.* at para. 19.

we again asked whether the horizontal limits should be based on the number of actual subscribers or the number of homes passed.[51] We noted that a subscriber-based standard might present a more reliable number and could be more accurately calculated. In addition, we stated that if we amended the rules to include all MVPDs in the calculation, a homes-passed standard would be difficult to implement because several MVPDs might pass the same homes and Direct Broadcast Satellite ("DBS") programming providers pass every home in the country.[52] In addition to requesting comment on the benefits of a subscriber-based system, we sought comment on whether an operator approaching the limit might stop taking new subscribers or whether it would be able to anticipate the need to sell one of its systems in order to stay within the limit. We also asked whether we should devise special rules to address situations where subscriber growth within an operator's current systems might push the operator over the 30% limit.

B. Discussion

21. We will amend our rules to base them on how many subscribers an operator serves. Although homes passed might be a more stable number in that it does not fluctuate as often as numbers of subscribers,[53] it is not as reliable as the number for subscribers because homes passed calculations are based on estimates whereas subscriber numbers are based on billing records.[54]

22. More importantly, the horizontal ownership rules are designed to gauge the market power that an operator could potentially assert in

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[51] *Further Notice* at para. 79.

[52] *Further Notice* at paras. 84-86.

[53] See CU Comments at 12.

[54] See Adelphia *et al.* Comments at 23; TCI Comments at 58-61; Time Warner Comments at 28; contra RCN Comments at 18; RCN Reply Comments at 14.

the national programming marketplace.[55] In situations where there is only a single multichannel video provider, whether subscribership or homes passed data is used is largely a mechanical issue in terms of the market power issue. The return received by the content provider could equally be based on a share of revenues received, subscribers served, or size of the community involved depending on the contractual and economic (risk sharing) relationships involved. As the market develops in terms of competition we believe, in contrast to the argument made by RCN and in agreement with the cable operators, that an operator's actual number of subscribers more uniformly and accurately reflects power in the programming marketplace than does the number of homes passed.[56] While an operator may pass a large number of homes in its franchise area, the operator could have a low penetration rate in that area due to competition from other MVPDs or other factors, thereby rendering the number of homes passed an inaccurate indicator of the operator's market power.[57] Moreover, an operator does not purchase programming for the number of homes that it passes, but rather for its actual number of subscribers; thus, an operator's share of subscribers more accurately reflects its market power.

23. In addition, our decision below to include non-cable MVPDs in the horizontal limits calculation further supports our decision to rely on subscriber numbers. More than one MVPD may pass the same homes, making it difficult to determine an MVPD's share of the MVPD market on a homes passed basis. Moreover, although DBS providers pass every home in the country, homes passed does not accurately reflect their market power because DBS providers only serve approxi-

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[55]TCI Reply Comments at 35-36; Time Warner Reply Comments at 18.

[56]See TCI Comments at 61; Time Warner Comments at 29; TCI Reply Comments at 35.

[57]See Adelphia *et al.* Comments at 24; NCTA Comments at 19; Time Warner Comments at 29; Adelphia *et al.* Reply Comments at 12.

mately 10% of MVPD subscribers.[58]

24. Any theoretical deterrence that a subscribers-based limit might pose to keep an operator from adding new subscribers when the operator reaches the limit[59] does not outweigh the benefits of a subscribers-based system and does not merit an exception to the limit. Based on this record, we find it more reasonable that an operator will be aware of its potential growth areas when making acquisitions such that it will not cease accepting new subscribers in existing systems for fear of passing the limit. In their comments, the operators set forth in great detail their plans for consolidating or clustering their systems in order to enjoy the economies of scale that a large subscriber base will give them. The operators argue that a larger subscriber base in a clustered system will enable them to lower costs, improve current services, offer telephony and internet, and develop regional programming networks, as well as provide other benefits.[60] Given their long-term business planning and stated interest in clustering, operators will know in advance which systems they intend to grow for a larger subscriber base and which systems they intend to sell. Accordingly, an operator with an interest in the economic efficiency of its clusters would likely plan in advance to divest itself of a system rather than forego adding subscribers to systems or clusters within the operator's growth plan.

25. Thus, we disagree with MediaOne and Time Warner that an exception is needed based on the need to reflect in the rules "the

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[58] *1998 Competition Report* at App. C, C-1.

[59] See, e.g., CU Comments at 11-12.

[60] Cablevision Comments at 13; TCI Comments at 49-53; Bresnan Comments at 5, 22-23 (cable modems and digital cable television); NCTA Comments at 9 (clustering reduces duplicative costs); MediaOne Comments at 14; Time Warner Comments at 10; Adelphia *et al.* Reply Comments at 6; Comcast Reply Comments at 6; Cablevision Reply Comments at 7. MediaOne also argues that clustering enables MSOs to advertise their services in order to counter competition from other types of MVPDs. MediaOne Comments at 14.

dynamic nature of the communications marketplace."[61] Once the rules are in effect, nothing in the record suggests that, under the dynamics of the marketplace, an operator might find itself suddenly surprised that it cannot take any more subscribers without violating the horizontal ownership rules. We also disagree with MediaOne that an exception is necessary to ensure that cable operators are not prevented from servicing previously unserved rural areas.[62] MediaOne has not shown how a subscribers-based method impacts a rural area any differently than it impacts an urban area. MediaOne argues that, without an exception, the horizontal limit might prevent cable systems from expanding to certain rural areas in violation of some franchise agreements. First, cable already passes nearly 97% of homes nationwide.[63] Second, an operator is on notice with regard to the horizontal ownership rules and its franchise obligations, and the horizontal rules will not prevent a cable system from fulfilling its franchise obligations. If a franchise agreement requires an operator to expand its subscribership such that the operator will violate the horizontal limits, then the operator must divest a system elsewhere in order to stay within the limits and to meet its franchise obligations.

V. Using Total MVPD Subscribership to Calculate the Horizontal Limit

A. Background

26. In the *Further Notice*, we proposed that the horizontal ownership rules reflect the presence of all MVPDs rather than cable MVPDs alone in order to reflect changes in the MVPD market and their impact on

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[61]See, e.g., MediaOne Comments at 31; Time Warner Comments at 27.

[62]See MediaOne Comments at 31.

[63]National Cable Television Association, Current Estimates, available at: <http://ncta.cyberserv.com/qs/user_pages/Dev(currentestimates).cfm> (96.60% of homes passed/TV households).

programming power.[64] We noted that the emergence of non-cable MVPDs diminishes an operator's market power over programming while conversely an operator's interest in non- cable MVPDs increases its market power.[65] We requested comment on whether such a revision would be consistent with the Commission's statutory authority under Section 613.[66] In calculating a cable operator's market share, we proposed that the numerator would contain the operator's cable subscribers plus that operator's non-cable MVPD subscribers, and the denominator would contain the total number of cable subscribers plus non-cable MVPD subscribers nationwide.[67]

B. Discussion

27. We conclude that it is appropriate under Section 613 to include all MVPD subscribers in the horizontal limits calculation in order to reflect changes in the marketplace since 1993. In order to encourage competition through overbuilding, however, we will not include cable subscribers that an MSO serves through non-incumbent cable systems, as that phrase is defined below. In the Commission's determination of the appropriate measurements under the horizontal ownership rules, Section 613(f)(2)(A) requires the Commission to ensure that a cable operator cannot, by virtue of its size or by acting in concert with other cable operators, unfairly impede the distribution of video programming.[68] Moreover, Section 613(f)(2)(E) requires the Commission to

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[64] *Further Notice* at paras. 79-80.

[65] *Further Notice* at paras. 80-81.

[66] 47 U.S.C.§533(f)(1)(A).

[67] *Further Notice* at para. 79.

[68] Section 613(f)(2)(A) provides, "[The Commission shall] ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size,

consider "the dynamic nature of the communications marketplace."[69]

28. The MVPD marketplace has changed since 1993. In our *Competition Reports*, we have stated that the effect of horizontal concentration on programming should take into account the presence of all MVPDs:

> in assessing the impact that national concentration may have in the MVPD programming market, we believe that it is appropriate to consider the presence of all MVPDs and MVPD subscribers in national concentration figures, and not just cable MSOs and cable subscribers. As non-cable MVPD subscribership increases, the significance of DBS, MMDS and SMATV operators in the MVPD program purchasing market also increases.[70]

29. Although cable continues to be the primary source of multichannel programming, its share of the MVPD market fell to approximately 81.77% in June 1999,[71] from 85.34% in June 1998, and from 93.37% in December 1994.[72] Currently, DBS has a 12.47% market share, home satellite delivery ("HDS") has a 2.21% market share, MMDS has a 1.73% market share, SMATV has a 1.73% market share, and OVS has a 0.09%

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the flow of video programming from the video programmer to the consumer[.]" 47 U.S.C.§533(f)(2)(A).

[69]47 U.S.C.§533(f)(2)(E).

[70]1997 Competition Report at para. 150.

[71]Cable had 66,065,400 subscribers in June, 1999. Kagan, *The Cable Financial Databook, 1999*. The current total number of MVPD subscribers is approximately 80,792,800, based on an estimated 1.4 million MMDS subscribers, 1.4 million SMATV subscribers; 66,000 OVS subscribers, 10,078,000 DBS subscribers and 1,783,411 HSD subscribers. *See Kagan's Marketing New Media* at p.1 (Oct. 19, 1998); *1998 Competition Report* at App. C, C-1; SBCA Comments in response to *Notice of Inquiry. In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*. CS Docket No. 99-230.

[72]*1998 Competition Report at* App. C, C-1. 1999 WL 958598 (F.C.C.), 14 F.C.C.R. 19,098, 14 FCC Rcd. 19,098, 17 Communications Reg. (P&F) 1158

market share.[73] Between June 1997 and June 1998, DBS grew from approximately 5 million subscribers to 7.2 million subscribers, an increase of almost 43%.[74] By June 1999, DBS had grown to 10.078 million subscribers.[75]

30. Given the past and expected future growth of non-cable MVPDs, we believe that it is consistent with Section 613's mandate to include all MVPD subscribers in both the denominator and the numerator when calculating an MSO's market share under the cable horizontal limits. We reject the argument that non-cable MVPDs should not be placed in the denominator because cable has certain types of competitive advantages over non-cable MVPDs.[76] Although we agree that cable is still dominant in the MVPD marketplace, non-cable MVPDs have a growing impact on that marketplace. Inclusion of both cable and non-cable MVPD subscribers in the denominator will reflect the dynamic nature of the marketplace and the diminishing market power of cable operators as non- cable MVPDs increase their subscribership.

31. Likewise, when calculating an MSO's horizontal ownership, inclusion of both its cable and non-cable MVPDs subscribers in the numerator will reflect the market power held by that MSO through its total number of MVPD subscribers, whether reached through cable or other MVPD systems. This rule recognizes the increased market power gained by an MSO through its non-cable MVPD subscribers. This rule thus serves the objectives of Section 613 by reflecting both the dynamic nature of the marketplace and the ability of an MSO to impede the flow of programming by virtue of its total number of subscribers.

32. This rule is also consistent with Section 613's directive that the Commission establish limits on the number of cable subscribers a

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[73]See note 71 supra.

[74]*Id.* at paras. 5, 12.

[75]See note 71 supra.

[76]See CU Comments at 7; RCN Comments at 16-17.

person may serve.[77] The rule will not limit the number of subscribers a cable operator may reach through alternative MVPD systems. It also will not apply to persons who have no attributable ownership interests in cable systems. This rule will create a sliding or adjustable cable horizontal ownership limit, under which the number of subscribers a cable operator is authorized to reach through cable systems would decrease in proportion with any increase in the number of subscribers that that entity reaches through other MVPD systems. Conversely, the cable horizontal ownership limit would be higher for a cable operator that reaches fewer subscribers through other MVPD systems. This sliding scale calculation will more accurately reflect a cable operator's potential monopsony power and the extent of its control in the MVPD marketplace as a whole.

33. In order to promote competition in the marketplace, we find it appropriate at this time to include in an MSO's horizontal limit only those cable subscribers that it serves through incumbent cable franchises. For purposes of the horizontal ownership rule, "incumbent cable franchise" shall mean all cable franchises in existence on the date this order is released, October 20, 1999, and all successors in interest to those franchises. An MSO's cable subscribers shall include all subscribers served by those incumbent cable franchises, regardless of when the subscribers were added to the incumbent cable franchise system.

34. This rule will continue to limit an MSO's growth through acquiring incumbent cable franchises where cable-programming power is dominant. On the other hand, the rule sets no limits on an MSO overbuilding "incumbent cable franchises," thereby encouraging competition, more outlets for programming networks and more choices for consumers. Thus, we find that the benefits of not counting customers served via overbuilding outweigh any potential anticompetitive impact on the programming marketplace.

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[77]See Section 613(f)(1)(A) of the Communications Act, 47 U.S.C.§533(f)(1)(A); TCI Comments at 59; TCI Reply Comments at 31; Time Warner Comments at 31; NCTA Reply Comments at 3.

35. For purposes of reviewing compliance with the horizontal ownership limit, parties may use any generally accepted industry data as to the total MVPD subscriber count. We recognize that not all of the data used by the industry is identical and that some degree of estimation and double counting may be involved. We see no need, however, for parties subject to the limit, or for our own enforcement purposes, to spend unnecessary time refining the data given that the rule itself is based on estimates. Accordingly, in reviewing compliance with the rule, we will accept any published, current and widely cited industry estimate of MVPD subscribership. We would expect any party nearing the limit to bring to the Commission's attention any acquisition that would place them in conflict with the rules in accordance with the reporting requirement of Section 76.503(g).[78]

VI. The Level of the Horizontal Ownership Limit

A. Background

36. In the *Second Report and Order* and the *Second Order on Reconsideration*, we found that a limit of 30 percent of households passed by all cable operators represented a careful balance between: (1) limiting the possible exertion by a cable operator of excessive market power in the purchase of video programming; and (2) ensuring that cable operators are able to expand and benefit from the economies of size necessary to encourage investment in new video programming technology and the deployment of other advanced technologies.[79] In the *Further Notice*, we requested comment on whether 30% remains the appropriate horizontal limit in light of any changes in market conditions since 1993,

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[78] See Appendix B.

[79] *Second Order on Reconsideration* at paras. 8, 37-42.

when the initial rules in this proceeding were issued.[80]

37. Because we agree with the cable operators that emerging non-cable MVPDs have an impact on the programming marketplace, we will, as discussed above, amend the horizontal limits rule to include all cable and non-cable MVPD subscribers in the calculation of the appropriate horizontal market. In addition, as discussed below, to the extent that cable operators have concerns regarding efficiencies of scale and competition with incumbent telephone service providers, we will permit cable operators to grow in size through overbuilding without counting subscribers reached in that manner towards an operator's horizontal limit. With these exceptions, which we will take into account in the calculation of the horizontal limit, the commenters have not presented any new or credible facts that would alter our conclusion regarding the need for and the considerations applicable to the adoption of an appropriate horizontal limit.[81] Although the theoretical underpinnings for the rule remain unchanged and we continue to believe a 30% rule is appropriate, the effect of changing to a calculation based on the total size of the MVPD market results in a significant relaxation of the rule. The rule we adopt, a cable subscriber limit of no more than 30% of MVPD subscribers, is equivalent to a 36.7% limit based on cable subscribership alone.[82] We find this change justified by

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[80] *Further Notice* at para. 32. In the *Second Report and Order*, we stated that we intended to review the horizontal limits every five years in order to determine whether they were still reasonable under new market conditions and continued to meet their policy objectives. *Second Report and Order* at para. 40.

[81] Indeed, there was little agreement among the commenters as to what the horizontal ownership limit should be. Commenters supported horizontal ownership limits ranging from 20% to 50%. See, e.g., RCN Comments at 13; Bresnan Comments at 28; MediaOne Comments at 30; TCI Comments at 65.

[82] See note 72 *supra*. Thirty percent of the current 80,792,811 total MVPD subscribers permits an operator to serve 24,237,843 subscribers. 24,237,843 divided by the current 66,065,400 total cable subscribers permits an operator to serve 36.69% of cable subscribers. We note that, according to NCTA, there are currently 67,607,910 total cable

the record and a consideration of the criteria specified in Section 613. Otherwise, however, we find nothing in the record that would justify upsetting the balance established in the initial rules. We discuss below the commenters' arguments regarding the cable operator's role as a media gatekeeper, competition, and the efficiencies of consolidation.

38. Guidelines A, B, C and G of Section 613(f) require the Commission to ensure that cable operators, unilaterally or in coordination, do not unreasonably restrict the flow of video programming to consumers and do not hinder the development of new programming from diverse voices.[83] When Congress enacted Section 613(f)(1)(A), it concluded that cable industry concentration may enable MSOs to exercise excessive market power, or monopsony power, to bar the entry of new programmers and to reduce the number of media voices available to consumers:

> The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers.[84]

In particular, Congress was concerned with the possibility that "media gatekeepers will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both."[85] At the time of the 1992 Cable Act, cable

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subscribers and 81,827,910 total MVPD subscribers. NCTA Comments in response to *Notice of Inquiry, In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230. Using NCTA's numbers, 30% of all MVPD subscribers equals 36.31% of all cable subscribers.

[83] 47 U.S.C.§533(f)(2)(A),(B),(C) & (G).

[84] 1992 Cable Act,§2(a)(4); 47 U.S.C.§521 note; see also *Senate Report* at 33 ("[L]arge MSOs have the market power to determine what programming services can 'make it' on cable.").

[85] *Senate Report* at 32-33; see also Section 613(f)(2)(G) (directing the Commission to impose no rule that would impair the development of diverse and high quality programming); *House Report* at 43 (1992) (diversity of information services).

served over 56 million households representing over 60% of all television households.[86] As of June 1999 cable served more than 66 million homes, representing approximately 82% of all MVPD households.[87] Thus, cable television remains the primary source of information and programming for many households in the United States. The horizontal rule limits the extent to which one or a few operators could reduce the number of diverse programming voices in the United States.

39. In the search for appropriate decisional criteria on which to base the Congressionally mandated ownership limit, one important element of the equation is the issue of what limit will sufficiently assure that no single cable operator "or group of cable operators" can "unfairly impede the flow of video programming from the programmer to the consumer."[88] If the rule can help to assure that no single operator or group of operators can unilaterally determine the success or failure of a new programming service, then the rule can achieve one important congressional purpose.

40. In our *1996 Competition Report*, based on information supplied by program providers in proceedings before the Commission, we suggested that, to have a long term prospect for success, the initial subscriber requirement for a new channel would be at least 10 to 20 million households.[89] In our *1998 Competition Report*, we noted the conventional understanding that in the typical mass market, an advertiser supported programming network needs between 15 and 20 million subscribers in order to ensure its long-term viability.[90] Some have argued that a

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[86] 1992 Cable Act,§2(a)(3); 47 U.S.C.§521 note.

[87] See note 71 supra.

[88] 47 U.S.C.§533f)(2)(A).

[89] *1996 Competition Report*, 12 FCC Rcd 4358 at para. 135.

[90] *1998 Competition Report* at para. 152. *See also 1997 Competition Report*, 13 FCC Rcd 1034, para. 155 (1998) ("Conventional understanding in the cable industry appears to be that a successful launch of a new mass market, advertisers supported, national program-

cable network needs as many as 30 to 40 million subscribers in order to attract advertising dollars to ensure long-term viability.[91] In the context of other Commission proceedings, parties within the industry have urged that it is generally not possible for a new, niche cable network to break even until its distribution reaches 20 million subscribers.[92]

41. Staff analysis further supports 15 million as a minimum subscriber number for viability. In analyzing data consisting of 1988-98 subscription figures for 68 cable networks along with the launch date for each,[93]

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ming network -- that is, the initial subscriber requirement for long- term success -- requires that the new channel be available to at least fifteen to twenty million households.")

[91] *See CAB Report: The Big Picture Channel Crossings*, Mediaweek (Apr. 14, 1997) (real growth over time comes from advertising) (*CBS Stumbles in Cable Distribution Game*, Cable World at 8 (Aug. 3, 1998) ("Typically, an ad supported network needs 40 million subscribers to attract ad revenues."); *Cable Networks Get Choked in Channel Congestion: Even with Upgrades, Niche Contenders Outnumber Open Spaces*, The Kansas City Star at E-1 (Apr. 4, 1997) (any cable network reaching fewer than 30 million subscribers is not getting advertising dollars that will make them profitable); *Cartoon Network Tops 30 Million: Large Subscribership Helps Sell Advertising*, The Atlanta Journal and Constitution at 5-C (Oct. 1, 1996) ("Advertisers do not seriously consider most cable channels until they garner 30 million subscribers, say industry experts.").

[92] *Closed Captioning and Video Description of Video Programming*, 13 FCC Rcd 19973, para. 45 (1998) ("GSN argues that it is generally impossible for a new, niche cable network to break even until its distribution reaches 20 million subscribers ..."); see Joint Comments of Outdoor Life Network, Speedvision Network, The Golf Channel, BET on Jazz, and America's Health Network in In re Closed Captioning and Video Description of Video Programming, MM Docket No. 95-176, at 10 (filed Feb. 28, 1997); *In the Matter of Outdoor Life Network and Speedvision Network*, 13 FCC Rcd 12226, note 116 (1998) ("The Networks contend that at 20 million subscribers, they will achieve a level of distribution sufficient to attract volume purchases by national advertisers and to generate subscriber revenues that approach the level necessary to carry the Networks operating costs.").

[93] *See* Paul Kagan Associates, Inc., *Cable Television Household Growth 1988- 98*, Cable Program Investor at 12-13 (Mar. 15, 1999). In performing this particular calculation,

staff found that networks that survive for a long period of time almost always obtain more than 15 million subscribers. Of the 39 networks started in or before 1988, 38 had more than 15 million subscribers in 1998.[94] Thus, we find no basic disagreement as to the general requirement for a cable programmer to succeed and have a reasonable prospect for survival.

42. Although we believe the 15-20 million subscriber estimates are now generally accepted in the cable industry as evidenced by the cable industry's reliance on this target in their comments in this proceeding,[95] we acknowledge that they may not cover every type of programmer. Some programmers may need far more subscribers to be successful, while others may need far fewer,[96] depending on the particular programmer's programming costs, target audience, and financial strength. Nevertheless, in balancing the Section 613(f)(2) factors, we must adopt a standard of general applicability in determining the horizontal limit. To that end, for purposes of this analysis, we will assume that a new programmer needs 15 million subscribers in order to have a reasonable chance to achieve economic viability. We use the lower number 15 over 20 million as a baseline in order to counterbalance the competing objectives of Section 613 to recognize the dynamics of the marketplace and the efficiencies of size. Fifteen million subscribers are not an

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the staff discarded 4 of the 72 networks that Kagan surveyed: WTBS, WGN, the Disney Channel, and Q2. WTBS and WGN are both superstations and have compulsory licenses for carriage. The Disney Channel was a premium channel for much of its life, and Q2 is now defunct.

[94] *Id.*

[95] See, e.g., Time Warner Comments at 25 n. 68; TCI Comments at 76 n.122; Bresnan Comments at 25.

[96] Indeed, sixteen (24%) of the networks surveyed by Kagan had fewer than 15 million subscribers in 1998, and 14 of those 16 have been in business for three or more years. See Paul Kagan Associates, Inc., *Cable Television Household Growth 1988-98*, Cable Program Investor at 12-13 (Mar. 15, 1999).

absolute minimum for viability. It is instead a number of subscribers that provides a reasonable probability of long-term success for a cable network. Fifteen million subscribers represent approximately 18.56% of the MVPD market.

43. Using the 15 million-subscriber number, a programmer could still theoretically obtain the minimum necessary circulation even if one system operator held 35, 40, or even 80% of the market. We do not agree, however, with the position of the cable operators that this is the end of the analysis.[97] We disagree with the cable operators' assumption that the horizontal limit should be designed with only a single large operator in mind.[98] Congress was concerned not only by the behavior of a single operator, but also with the possibility that a group of operators might decline to carry the programmer. Section 613(f)(2)(A) specifically directs the Commission to

> ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer ....[99]

Thus, the horizontal limit must account for the possibility that a group of operators will collectively deny carriage to a new programmer, either by unilateral, independent decisions or by tacit collusion. The limit should be set at a level such that, if each member of the group reaches the horizontal limit, the operators' "collective market share" will still leave enough of the market available to the programmer so that the programmer has a reasonable chance of obtaining the subscribers it needs in order to become financially viable. The legislative assumption is not unreasonable given an environment in which all the

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[97]See, e.g., Bresnan Comments at 28; Time Warner Comments at 26.

[98]See, e.g., Bresnan Comments at 28 (cable network could still obtain 15-20 million subscribers even if limit were 50%); Time Warner Comments at 26.

[99]Section 613(f)(2)(A) (emphasis added).

larger operators in the industry are vertically integrated so that all are both buyers and sellers of programming and have mutual incentives to reach carriage decisions beneficial to each other. Operators have incentives to agree to buy their programming from one another. Moreover, they have incentives to encourage one another to carry the same non-vertically integrated programming in order to share the costs of such programming.

44. The limit should also take into account that both cable operators and cable networks benefit from having a certain number of large MSOs. The MSOs benefit from the efficiencies of economies of scale. The cable networks benefit in that, if a new cable network obtains carriage on one large MSO, it will incur significantly lower transaction costs.

45. Examining the horizontal limit from the cable network's perspective, given that 20% of the market is the share that a cable network must reach to ensure viability, and assuming that there is a public value in minimizing transaction costs, one could argue that 20% is a lower bound on the appropriate MSO limit. A 20% limit would preserve the possibility that a cable network could acquire its minimum subscriber level in a single negotiation. In addition, if 5 MSOs were to divide the market, the cable network would have five chances of obtaining carriage. This would also serve the public interest by maximizing the potential that there would be at least 5 voices.

46. However, it is unlikely that a network could, in fact, achieve 20 enetration via a single MSO that reaches 20% of total subscribers. First, some of the MSO's cable systems may lack channel capacity and will be unable to carry the cable network at all. Second, those systems of the MSO that have channel capacity may place the cable network on an upper or digital tier or on a premium channel that not all subscribers receive. A 20% limit might therefore be unreasonably small in terms of efficiency from the cable network's point of view.

47. In addition, we find no reason to believe that the remaining four MSOs, comprising 80% of the market, would collectively decline to carry the new cable network, thereby leaving the programmer with

only one MSO. Balancing the efficiencies of size against the possibility of group action,[100] we believe that assuming coordinated action by two operators rather than by three or more operators is appropriate at this time. Under this scenario, if two MSOs, comprising 40% of the market, declined to carry a new cable network, this would leave 60% of the market available to the network. However, giving the cable operators the benefit of the doubt, we do not believe that a cable network requires an open field of 60% of the market in order to secure the 15 million subscribers the new cable network needs on average to succeed.

48. In this regard, we will examine and weigh various market factors to approximate a typical cable network's probable rate of success of reaching subscribers through cable operators that do not flatly deny the cable network carriage. We reviewed cable industry literature to examine the subscriber numbers of cable networks and to determine whether there was any evidence of the market factors underlying such a rate. In analyzing Kagan's June 30, 1999 census of cable network subscribers, we found that the 72 networks contained in the census had an average carriage rate of 53% (with a range from 95% to 5%) of 80.8 million subscribers.[101] We also reviewed another census of cable networks published by Cablevision magazine. For the 105 surveyed networks for which subscriber numbers were available, the average carriage rate was 36% of the total of 80.8 million MVPD subscribers.[102] Thus, the appropriate success rate would appear to be between 36% and 53%. However, the Cablevision and Kagan censuses do not reveal how many subscribers a cable network actively attempted - but failed -- to reach. In addition, the censuses do not explain what market factors worked for or against a cable programmer's carriage rate.

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[100]See Sections 613(f)(2)(A)&(E).

[101]See Paul Kagan Associates, Inc., *Cable Network Census*: June 30, 1999, Cable Program Investor at 8 (Aug. 13, 1999).

[102]See *Cablevision* at 73-74 (July 19, 1999).

49. Nevertheless, our review of the market factors affecting a new programmer's entrance demonstrated support for an average rate of success between these percentages. A programming network's ability to obtain carriage on cable systems may be limited by market conditions such as the lack of channel capacity on certain cable systems,[103] the high cost of competitive entry,[104] the competitive advantages of networks carried by the largest MSOs,[105] the demographics of audiences in certain viewing areas, and other non-quantifiable factors, such as the programming tastes of particular cable operators.[106] In addition, given the process of selling cable service by tiers, even where a pro-

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[103] *See Digital Carriage Notice* at para. 45 n.113 (noting that, according to Nielson's Cable On-Line Data Exchange, approximately two-thirds of cable systems in early 1998 were channel locked); see also *See Popcorn: The Latest Indie to Die*, Multichannel News at 1 (Nov. 25, 1996); *New Nets: Tough Act to Open: Cable Television Launches Postponed*, Cablevision (Nov. 27, 1995 (network launches delay due to lack of channel capacity and tight finances); *Comcast Shuts Q2 for Style*, Multichannel News at 1, 60 (Aug. 31, 1998) (reached only 8 million subscribers and lost $50 million over two years); *CBS Stumble in Cable Distribution Game*, Cable World at 8 (Aug. 3, 1998) (CBS sells its share of Eye On People network stating that it could not justify the ongoing financial strain of supporting a start-up cable network).

[104] *See Closed Captioning Order on Reconsideration*, FCC 98-236 at para 54 ("[N]ew networks, especially in the early stages, frequently must pay for carriage, and struggle to become an accepted venue for national advertising. These economic circumstances create significant accumulated debt and deferred earning which must be recovered from revenues if the network is to remain viable."); *In re New England Cable News*, 9 FCC Rcd. 3231 at para. 35 (1994) ("It is not uncommon for new programming services to sustain losses for long periods of time before their investors see any return on investment."); see also notes 107-112 *supra*.

[105] See Dennis H. Liebowitz, *Buyer's Guide for Programming - Thanks to TCI*, News Corp., Cable TV and New Media Law & Finance, Feb. 1997, at 1 ("[T]he new math makes it more expensive to absorb the cost of launching a new network. In turn, this favors existing networks.").

[106] *E.g., Combat Sports May Face Ultimate Finish*, Broadcasting and Cable (May 12, 1997) (certain cable operators drove the sport ultimate fighting off their cable systems despite the sport's popularity with their customers).

gramming network is added to a particular system it is unlikely that all subscribers to the system will purchase the network. Comments in this proceeding demonstrate that even vertically integrated programming networks generally do not reach 100% of an affiliated operator's subscribers and that carried networks in general may reach as few as 10% or as many as 95% of an operator's subscribers.[107] Given these inherent roadblocks to carriage, we find that it is reasonable to assume that a programming network will have at the most a 50% success rate of overcoming these roadblocks with respect to each subscriber available to it.

50. Like the 15 million-subscriber figure, the 50% success rate figure is a rough attempt to quantify a multitude of business conditions that may vary widely from programmer to programmer. Some new cable networks may have a higher success rate if they are affiliated with existing networks or cable operators, while other new cable networks produced by parties new to the cable market may have a lower success rate. We believe that the 50% figure takes into account the varying factors for market entrance. Because we believe that a cable network has a 50% chance of successfully obtaining carriage, only 40% of the market need be available to a new cable network for it to reach the 15 million subscribers (or 20% of the market) it needs. Accordingly, it is not necessary to maximize the number of MSOs controlling 20% of the market or to protect 60% of the market for a new cable network. Moreover, given the limited benefit to the cable networks, a 20% cable horizontal ownership limit threatens to limit unduly an MSO's ability to achieve economies of scale.

51. Examining the limit from the cable operator's side, one could posit an 80% limit, which would leave 20% of the market available to an MSO that might carry the new network. This scenario has several problems. Cable networks selling programming to two such unequally sized MSOs may charge excessively low rates to the large MSO and compensate by charging excessively high rates to the small MSO, or

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[107]See, e.g., TCI Comments, Appendix A, Table A-1.

enter other contractual arrangements that harm the customers to the small MSO and pose significant monopsony concerns. Although, a 50% limit could lead to a more even duopoly, the weaknesses of such competition are well established. The probability of tacit collusion is higher with 2 competitors than 3 competitors. Moreover, Congress was concerned with a "reduction in the number of media voices available to consumers," and devising a rule that would allow only two MSO gatekeepers to select those voices does not meet the congressional mandate.[108] Finally, Congress was concerned with the possibility that a group of MSOs might together harm a programmer, and a 50% limit permitting two MSOs to unilaterally or collectively harm a programmer would not address this concern.[109]

52. A 40% limit would pose similar problems. Although a cable network would have a reasonable chance of success if it gained access to an MSO at the 40% limit, two MSOs at the 40% limit, representing a total of 80% of the market, might decline to carry the new network. Even assuming that the remaining 20% of the market was in the hands of one MSO and that MSO agreed to carry the programmer, it is highly unlikely that the programmer would reach 100% of that MSO's subscribers for the reasons stated above. In addition, if the remaining 20% of the market is fragmented among several cable operators, the cable network again would be highly unlikely to succeed given a 50% success rate at carriage.

53. Approaching a horizontal limit from these two ends, a 20% limit favoring cable networks and a 40% limit favoring cable operators, we select a 30% limit as a reasonable balance between the interests of the cable networks and the cable operators. We believe that adopting a limit between 20% and 40% is reasonable given that the tradeoffs for the cable networks and the operators are roughly even. Based on this analysis, a new programmer would have a reasonable chance of

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[108]See 1992 Cable Act,§2(a)(4).

[109]See Section 613(f)(2)(D).

success if 40% of the 80,000,000 subscriber MVPD market is available to it after two operators have denied it access to the other 60% of the market. In other words, a 30% limit on a single operator's size will thereby prevent two large operators from obtaining control over 60% of the market. Thus, even if two operators, covering 60% of the market, individually or collusively deny carriage to a programming network, the network will still have access to 40% of the market, thereby giving it a reasonable chance of financial viability. This leaves open the possibility that two MSOs at the 20% limit might exist that could carry the cable network. In addition, assuming that the remaining 40% of the market is fragmented, leaving 40% of the market available to the cable network will give it a reasonable chance of success, given that we conclude that a cable network has a 50% chance of obtaining subscribers that are not actively denied to it.

54. While permitting cable operators to obtain economies of scale, the 30% limit serves the salutary purpose of ensuring that there will be at least 4 MSOs in the marketplace. The rule thus maximizes the potential number of MSOs that will purchase programming. With more MSOs making purchasing decisions, this increases the likelihood that the MSOs will make different programming choices and a greater variety of media voices will therefore be available to the public.[110]

55. We conclude that a 30% limit would fulfill Section 613(f)(2)'s mandate to strike a proper balance between the dangers to new programmers and the benefits to cable operators of economies of scale. Under current market conditions, we find that a 30% horizontal limit provides a new programmer with a reasonable chance of success, even if the largest operators decline to carry it. We acknowledge that the new cable programmer who is denied carriage by the largest operators may be at a severe competitive and financial disadvantage in the marketplace given the declining marginal cost basis of the program-

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[110]See 1992 Cable Act§2(a)(4).

ming distribution business.[111]

56. The market power of large cable operators has the potential to prevent nascent cable networks from even launching and to cause current networks to fail. While the exercise of market power could result in lower negotiated programming costs for cable operators in the short run, it could also adversely affect the development of diverse and innovative programming in the long run. Studies have shown that increased horizontal concentration has both efficiency and negative market consequences.[112] New networks might not be able to operate successfully subject to the lower prices that large operators are able to demand by virtue of their size.[113] Launch costs for a new cable network are estimated to be between $100 to $125 million.[114] New networks often must initially pay for carriage.[115] In addition, although advertis

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[111]See Dennis H. Liebowitz, *Buyer's Guide for Programming - Thanks to TCI*, News Corp., Cable TV and New Media Law & Finance, Feb. 1997, at 1 ("[T]he new math makes it more expensive to absorb the cost of launching a new network. In turn, this favors existing networks.").

[112]Ford, G.W., and J.H. Jackson, *Horizontal Concentration and Vertical Integration in the Cable Television Industry*, 12 Review of Industrial Organization at 514 (1997) ("Ford and Jackson"); Chipty, T., *Horizontal Integration for Bargaining Power: Evidence from the Cable Industry*, 4 Journal of Economics & Management Strategy at 375-397 (Summer 1995).

[113]See Dennis H. Liebowitz, *Buyer's Guide for Programming - Thanks to TCI, News Corp.*, Cable TV and New Media Law & Finance, Feb. 1997, at 1 ("[T]he new math makes it more expensive to absorb the cost of launching a new network. In turn, this favors existing networks.").

[114] *Viacom to FCC: Go Slow on Access*, Multichannel News at 50 (Sept. 7, 1998); *Struggling to Hook Up Viewers*, LA Times at F1 (Apr. 29, 1996) (quoting media analyst David Londoner, of Schroder Wertheim, and Lee Masters, MTV founder and CEO of El); *Acquired or Original?: New Networks are Mak..g Different Decisions than Their Predecessors*, Multichannel News at 8A (Jan. 16, 1995).

[115] *Throwing Money Around*, Cablevision at 14 (Jan. 27, 1997) ("Animal Planet is paying for carriage.... Networks like Sundance Channel, Independent Film Channel, Outdoor Life, Speedvision and others are all going to have to start paying just to get on systems

ing revenue is critical for a cable network's long-term success, some industry analysts believe that new networks cannot attract significant advertising until they surpass at least 30 million subscribers.[116] In particular, niche networks targeting small audiences with specific interests have difficulty attracting advertising.[117] Given the significant amount of debt a new network must therefore carry before it begins earning affiliation and advertising revenues,[118] nascent networks may not launch and new networks may fail because of an inability to carry

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- that is, using money that traditionally went into programming."); *Swimming Upstream - Programmers Caught in TCI's Recovery Net*, Multichannel News at 1 (Nov. 18, 1996) (TCI charging $14 and $8 per sub to launch Fox News and Animal Planet, respectively); *Sci-Fi Tries Incentives to Fuel Growth*, Multichannel News at 10 (Oct. 5, 1998) (at close to 50 million subscribers, Sci-Fi channel is offering $2 to $3 in launch support and free carriage in some instances).

[116] *See CBS Stumbles in Cable Distribution Game*, Cable World at 8 (Aug. 3, 1998) ("Typically, an ad supported network needs 40 million subscribers to attract ad revenues."); *Cable Networks Get Choked in Channel Congestion: Even with Upgrades, Niche Contenders Outnumber Open Spaces*, The Kansas City Star at E-1 (Apr. 4, 1997) (any cable network reaching fewer than 30 million subscribers is not getting advertising dollars that will make them profitable); *Cartoon Network Tops 30 Million: Large Subscribership Helps Sell Advertising*, The Atlanta Journal and Constitution at 5-C (Oct. 1, 1996) ("Advertisers do not seriously consider most cable channels until they garner 30 million subscribers, say industry experts.").

[117] *See Explosion of Channels Upping Ante For Agencies, Electronic Media at 22 (May 19, 1997); Cable's Little Engines That Might: Niche Channels Search For Shows, Bucks And Eyeballs; Small Start-Up Cable TV Channels*, Broadcasting & Cable at 62 (Mar. 31, 1997) (niche networks are almost guaranteed lower ratings from advertisers).

[118] *See Closed Captioning Order on Reconsideration*, FCC 98-236 at para 54 ("[N]ew networks, especially in the early stages, frequently must pay for carriage, and struggle to become an accepted venue for national advertising. These economic circumstances create significant accumulated debt and deferred earning which must be recovered from revenues if the network is to remain viable."); *In re New England Cable News*, 9 FCC Rcd. 3231 at para. 35 (1994) ("It is not uncommon for new programming services to sustain losses for long periods of time before their investors see any return on investment.").

this debt.[119] The 30% limit recognizes this dynamic of the communications marketplace[120] and the dynamic's ability to foreclose new programming.[121] TCI's argument that consumers benefit from lower rates (as a result of lower programming costs enjoyed by large MSOs due to their bargaining power) takes into account only the efficiency effect of horizontal concentration.[122]

57. As discussed above, the most significant change in the MVPD market has been the increased market share of non-cable MVPDs. We agree with the cable operators that the horizontal limits should take into account the non-cable MVPDs' impact on the programming marketplace. We take this into account by adopting our proposal that the calculation of the horizontal market include the presence of all MVPD subscribers. Using the presence of all MVPD subscribers in calculating the horizontal limit results in a self-adjusting horizontal limit whereby an operator's market share decreases when the total number of MVPD subscribers increases. Because the calculation of the horizontal limit will now automatically self-adjust based on the market share of noncable MVPDs, we need not alter the 30% limit to take into account their market share.

58. Cable operators argue that the emergence of new cable networks

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[119] *See Popcorn: The Latest Indie to Die,* Multichannel News at 1 (Nov. 25, 1996); *New Nets: Tough Act to Open: Cable Television Launches Postponed, Cablevision* (Nov. 27, 1995 (network launches delay due to lack of channel capacity and tight finances); *Comcast Shuts Q2 for Style,* Multichannel News at 1, 60 (Aug. 31, 1998) (reached only 8 million subscribers and lost $50 million over two years); *CBS Stumble in Cable Distribution Game,* Cable World at 8 (Aug. 3, 1998) (CBS sells its share of Eye On People network stating that it could not justify the ongoing financial strain of supporting a start-up cable network).

[120] See 613(f)(2)(E) ("dynamic nature of the communications marketplace").

[121] See 613(f)(2)(G) ("impose no limitations that will impair the development of diverse and high quality programming"); see also 1992 Cable Act,§2(a)(4).

[122] Using FCC rate data, Ford and Jackson found that only a portion of these discounts is passed along to consumers in the form of lower prices. Ford and Jackson at 514.

in the face of the continued growth of TCI, which purportedly passed 41% of homes passed by cable nationwide as of September 1998, demonstrates that cable operators have not used and will not use their monopsony power to adversely affect the programming marketplace.[123] TCI also argues that, compared to cable systems that do not have affiliated networks, TCI favors carriage of unaffiliated networks. That argument is likewise not convincing.[124] TCI's data appears to demonstrate the opposite. TCI's economic data appears to show that, as of 1995, TCI had favored carriage of 68% (13 of 19) of its affiliated networks versus 54% (25 of 46) of unaffiliated networks.[125] We also note that TCI's economists concede that their analysis does not take into account differences other than vertical integration among the systems in their study.[126] In addition, contrary to the findings of TCI's economists, several economic studies have shown that vertically integrated operators show preferences for their affiliated networks and exclude competing networks owned by independent programmers.[127]

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[123]MediaOne Comments at 11; NCTA Comments at 4-6, 9; TCI Comments at 16-17; TCI Reply Comments at 33. NCTA notes that broadband cable Internet may also be able to provide programming similar to what is now considered to be television, thereby creating additional avenues for programmers. NCTA Comments at 13.

[124]See TCI Comments at App. A; Stanley M. Besen & John Woodbury, *An Economic Analysis of the FCC's Cable Ownership Restrictions* at 18-21 (Aug. 14, 1998) ("Besen & Woodbury I"); *see also* Time Warner Reply Comments at 3 (*citing* Besen & Woodbury I).

[125]Besen and Woodbury I at 20 n.16.

[126]*Id.*

[127]Waterman, David, W. and Wise, Andrew, *Vertical Integration in Cable Television* at 88 (1997); Riordan, M. and D. Salant, *Exclusion and Integration in the Market for Video Entertainment Delivered to the Home* (July 7, 1994); Chipty, T, *Vertical Integration and Market Foreclosure: Evidence from the Cable Television Industry* at 19 (Feb. 1994); Olson, J. and L. Spiwak, *Can Short-Term Limits on Strategic Vertical Restraints Improve Long-Term Cable Industry Market Performance*, Cardoza Arts and Entertainment Law Journal at 285-315 (1995).

59. TCI's argument regarding its 41% homes passed market share lacks credibility in light of its arguments that actual numbers of total MVPD subscribers should be used to calculate the horizontal limit rather than homes passed. As noted above, we now recognize that the effective cable subscriber limit will be approximately 36.7% in light of today's market structure. Using these new methods of calculating the limit, TCI's market share would more likely approximate this limit. Moreover, TCI's argument does not take into account Section 613's mandate that we consider the possibility that two MSO's might foreclose a new programmer. In addition, WCA and Ameritech proffer credible evidence that indicates that MSOs have used their market power to cause unaffiliated programmers to refuse to sell their programming to other MVPDs. This evidence demonstrates another way in which MSOs can use their size and market power to impede the flow of programming to consumers in contravention of Section 613(f)(2)(A).[128] It is reasonable to assume that an unaffiliated programmer carried on a large MSO, with all the advantages that such carriage confers, would be disinclined to alienate the MSO by seeking carriage on a competitor.

60. While we agree with CU that a lower horizontal limit could promote competition through overbuilding,[129] we believe that 30% remains the appropriate limit to achieve these goals in light of the economies of scale it permits.[130] Competition will provide more ave-

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[128]Section 613(f)(2)(A) directs the Commission to devise rules that prevent MSOs from impeding the flow of programming to consumers. Ameritech and WCA state that, because of the MSOs' monopsony pressure, unaffiliated cable networks such as Fox News, MSNBC, Game Show Network, Eye on People, Home & Garden Television and TV Land act like vertically-integrated programmers and refuse to sell their products to alternative MVPDs. WCA Comments at 16; Ameritech Comments at 15; WCA Reply Comments at 5-10; see also CU Comments at 8 (stating that Viacom refused to provide its programs, such as Showtime, to People's Choice, a wireless cable company).

[129]CU Comments at 5.

[130]See *Second Order on Reconsideration* at para. 40

nues for programmers to reach subscribers.[131] The 30% limit may serve to facilitate the development of competition in those markets where cable operator market power already exists. By limiting the ability of large cable MSOs to merge or acquire incumbent cable systems, resulting in one or two MSOs controlling local cable market nationwide, the horizontal limit encourages cable operators to overbuild one another. Limiting this merger and acquisition potential may preserve opportunities for entry by overbuilders or other MVPD providers and reduce the likelihood that large MSOs can coordinate their behavior by mutually forbearing from overbuilding each other's service territories.[132] Coordinated activity between cable operators, whether tacit or overt, is more likely with few firms than many (due to greater ease in reaching a consensus, monitoring compliance, and punishing cheaters), and such behavior will have a greater impact the larger combined share of the market these firms control. Operators may use their market power to cause unaffiliated programmers to refuse to sell their programming to other MVPDs, thereby impeding the flow of programming to the consumer in contravention of Section 613(f)(2)(A).[133] The 30% limit also reduces the likelihood of coordinated activity between large cable MSOs in areas such as program purchasing, Internet services, and

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[131]See Section 613(f)(2)(A).

[132]See Section 613(f)(2)(c) (directing the Commission to take account of the market structure, ownership patterns and relationships within the cable industry).

[133]Section 613(f)(2)(A) directs the Commission to devise rules that prevent MSOs from impeding the flow of programming to consumers. Ameritech and WCA state that, because of the MSOs' monopsony pressure, unaffiliated cable networks such as Fox News, MSNBC, Game Show Network, Eye on People, Home & Garden Television and TV Land act like vertically-integrated programmers and refuse to sell their products to alternative MVPDs. WCA Comments at 16; Ameritech Comments at 15; WCA Reply Comments at 5-10; see also CU Comments at 8 (stating that Viacom refused to provide its programs, such as Showtime, to People's Choice, a wireless cable company).

equipment purchasing (e.g., set top boxes and converters).[134]

61. If the sole guideline in adopting rules were to encourage the largest number of sources of editorial control possible, the horizontal limit would be quite low. Guidelines E and F of Section 613(f)(2), however, require the Commission to include in the rulemaking balance the efficiencies and benefits of consolidation and the dynamic nature of the communications marketplace.[135] In the *Second Report and Order* and in the *Second Order on Reconsideration*, we recognized and weighed the benefits of clustering and economies of scale and determined that 30% was the appropriate number to encourage growth without unduly raising competitive concerns.[136] We find no basis in this record to alter this balance. Cable operators argue that the limit should be raised so that they may compete with common carriers for the provision of Internet and telephony services.[137] However, under the current rules, a cable operator may obtain as much as 30% of the cable nationwide market. A 30% limit allows a cable operator to gain access to a substantial portion of the market to provide Internet access and telephony. The cable operators have presented no credible evidence that a larger size is necessary for the deployment of advanced technologies or telephony. Moreover, we note the possibility of cooperative arrangements among operators to offer coordinated telephony services through their cable

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[134]See generally, James L. Langenfeld and Louis Silvia, *Federal Trade Commission Horizontal Restraint Cases: An Economic Perspective*, ANTITRUST LAW JOURNAL (1993); Alexis Jacquemin and Margaret E. Slade, *Cartels, Collusion, and Horizontal Merger*, HANDBOOK OF INDUSTRIAL ORGANIZATION, Richard Schmalensee and Robert Willig, ed., (1990); see also NCAA v. University of Oklahoma, 468 U.S. 85 (1984); *Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co.*, 105 S.Ct. 2613 (1985).

[135]47 U.S.C.§533(f)(2)(E) & (F).

[136]*Second Report and Order* at para. 25; *Second Order on Reconsideration* at para. 41; see also 1998 Competition Report at para. 144 (acknowledging the benefits of clustering).

[137]See, e.g., AT&T Comments at 10; Cablevision Comments at 20; TCI Comments at 53-56; MediaOne Reply Comments at 4; TCI Reply Comments at 15.

systems, so that a cable operator does not necessarily need to grow in absolute size beyond the limit in order to participate in the offering of a national telephony service.[138]

62. In addition, we disagree with the cable operators' arguments that the horizontal ownership rules prevent an MSO from clustering its systems in order to enjoy an economy of scale and to compete with the ILEC.[139] As we stated earlier in this proceeding, "[t]he 30% limit permits cable MSOs to cluster systems in order to gain efficiencies related to economies of scale and scope in administration, deployment of new technologies and services, extension into previously unserved territories, etc. Accordingly, the 30% limit simultaneously guards against the potential anticompetitive effects of horizontal concentration and allows cable MSOs to realize the benefits of clustering."[140] The horizontal limit permits an MSO to consolidate its systems in one area in order to compete with an ILEC, if it wishes to do so. If an MSO must divest a system in order to comply with the horizontal ownership rules, the MSO has the discretion to decide what cluster of systems to retain in order to serve its business plans and customers.

63. Ameritech and CU raise the negative aspects of clustering, observing that clustering may enable cable operators to deny their competitors access to affiliated video programming and may deter overbuilders.[141] RCN requests that we limit the size of cable clusters in order to

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[138]Paul Farhi, *Pact Ends MediaOne Bid War; Comcast Lets AT&T Buy Cable Rival,* The Washington Post (May 5, 1999) ("Comcast will allow AT&T to offer local telephone service to Comcast's cable customers." Agreement is dependent on AT&T reaching agreement with two other cable systems first.); Jarman, *AT&T Discusses Taking Over Cox Communication's Phoenix Telephone Service,* Knight-Ridder Tribune Business News (July 19, 1999).

[139]*See, e.g.*, MediaOne Comments at 30; NCTA Comments at 23.

[140]Second Memorandum Opinion and Order on Reconsideration at para. 41.

[141]See CU *et al.* Comments at 5; Ameritech Comments at 21; see also 1998 Competition Report at para. 144; *Second Order on Reconsideration* at para. 40.

promote competition.[142] In the *Second Report and Order*, we considered whether to adopt regional subscriber limits, but declined to do so.[143] We stated that other provisions of the Cable Television Consumer Protection and Competition Act of 1992 that were specifically designed to introduce local competition would better address issues regarding regional concentration.[144] In addition, there was no evidence in the record that indicated that any anticompetitive effects outweighed the potential benefits of cable clustering, such as regional programming, upgraded cable infrastructure and improved customer services.[145] Likewise, the record in this proceeding shows that the benefits of clustering - including market efficiencies and the deployment of telephony and Internet access services - outweigh any alleged anti-competitive effects on local programming.[146]

64. An additional cable operator argument in favor of a revised limit is that we that we should raise the cable horizontal limits to 35% because Congress raised the television broadcast station horizontal limits to 35%.[147] As indicated above, the practical consequence of including all MVPD subscribers in the base from which the limit is calculated is roughly equivalent to changing the rules to a 36.7% cable subscribers limit. We do not believe, however, that the commenters have shown how the broadcast station limits have any relevance to the cable horizontal limits. In contrast to the cable rules, the broadcast rules apply to single channel facilities where there are generally numerous

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[142]RCN Comments at 20.

[143] *Second Report and Order* at para. 16.

[144] *Id.*

[145] *Id.* at para. 17.

[146]Cablevision Comments at 13 n. 18; Bresnan Comments at 5, 22-23; TCI Comments at 49-53

[147]See, e.g., Adelphia *et al.* Comments at 29; Bresnan Comments at 25-26; MediaOne Comments at 40; Time Warner Comments at 24-25.

directly competitive broadcast outlets in the market. Because a broadcast station competes with other broadcast stations in a local market and viewers therefore have several options for television viewing, a broadcast station owner does not actually have 100% of the local market's viewers all of the time. Thus, a broadcast station owner at the 35% national ownership limit cannot be deemed to have 35% of the nation's broadcast television viewers all of the time. A cable system has a set number of viewers making it possible to calculate more specifically than broadcast the number of viewers a cable system owner serves at the national level. In Section 613, Congress set forth seven specific criteria for the establishment of cable horizontal limits, which the Commission has followed. In addition, we fail to see the relevance to this proceeding of the Commission rule allocating half of a television market to a UHF station.[148] That rule recognizes that a UHF station transmits a weaker signal than a VHF signal and likely is unable to reach an entire television market.[149]

65. Finally, we reject Adelphia *et al.*'s request that we not apply the rules to any transactions under contract prior to the release of the *Further Notice,* and that existing joint ventures not subject to TCI's managerial control be permitted to grow through limited acquisitions to gain efficiencies of clustering.[150] Parties have been on notice since the *Second Report and Order* was released in 1993 of the horizontal limit. For the reasons set forth in Section VIII below, the horizontal rules will become effective immediately when the District of Columbia Circuit issues a mandate upholding the rules and Section 613(f)(1)(A), and affected parties in violation of the horizontal rules at that time must comply with the rules within 180 days after the court issues its mandate.

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[148] 47 C.F.R.§73.3555(e)(2)(I).

[149] *Id.*

[150] See Adelphia *et al.* Comments at 32.

XI. Ordering Clauses

90. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 303 and 613 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303 and 533, that the amendments to 47 C.F.R. §76.503 discussed in this Third Report and Order and set forth in Attachment B ARE ADOPTED. These amendments shall become effective 70 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

91. IT IS FURTHER ORDERED that the August 17, 1999 Consumers Union, Consumer Federation of America, and Media Access Project's Motion to Vacate Stay of Enforcement of Horizontal Ownership Limits and other requested relief IS DENIED in its entirety.

92. IT IS FURTHER ORDERED that 47 C.F.R. §503(a)-(f) as set forth in Attachment B is STAYED until the United States Court of Appeals for the District of Columbia Circuit issues a decision upholding Section 613(f)(1)(A) of the Communications Act, as amended, 47 U.S.C. §533(f)(1)(A), and 47 C.F.R. §76.503, and affected parties in violation of 47 C.F.R. §503(a)-(f) will come into compliance within one hundred and eighty (180) days after the court issues its mandate.

93. IT IS FURTHER ORDERED that parties shall continue to comply with the reporting requirements of Section 503 of our rules, as modified by 47 C.F.R. §76.503(g) set forth in attachment B and as discussed in note 10 of this Third Report and Order.

94. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Third Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C.A. §601 et. seq.

FEDERAL COMMUNICATIONS COMMISSION
Magalie Roman Salas
Secretary

Appendix B

Rule Changes

Part 76 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 76 -- MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

Section 76.503 National Subscriber Limits

1. Section 76.503 is amended by deleting paragraphs (a) through (f) and adding paragraphs (a) through (g) as follows:

(a) Subject to paragraph (b) of this section, no cable operator shall serve more than 30% of all multichannel-video programming subscribers nationwide through multichannel video programming distributors owned by such operator or in which such cable operator holds an attributable interest.

(b) Cable subscribers that a cable operator does not serve through incumbent cable franchises shall be excluded from the cable operator's limit.

(c) For purposes of this section, "incumbent cable franchise" means a cable franchise in existence as of October 20, 1999 and all successors in interest to these franchises.

(d) Subscribers that a cable operator serves through incumbent cable franchises shall include all subscribers served by those incumbent cable franchises, regardless of when the subscribers were added to the incumbent cable franchise system.

(e) "Multichannel video-programming subscribers" means subscrib-

ers who receive multichannel video-programming from cable systems, direct broadcast satellite services, direct-to-home satellite services, multichannel multipoint distribution services, local multipoint distribution services, satellite master antenna television services (as defined in §76.5(a)(2)), and open video systems.

(f) "Cable operator" means any person or entity that owns or has an attributable interest in an incumbent cable franchise.

(g) Prior to acquiring additional multichannel video-programming providers, any cable operator that serves 20% or more of multichannel video-programming subscribers nationwide shall certify to the Commission, concurrent with its applications to the Commission for transfer of licenses at issue in the acquisition, that no violation of the national subscriber limits prescribed in this section will occur as a result of such acquisition.

Note 1: Certifications made under this section shall be sent to the attention of the Cable Services Bureau, Federal Communications Commission, 445 Twelfth Street, S.W., Washington, D.C. 20554.

Statement of Commissioner Harold W. Furchtgott-Roth,
Concurring in Part and Dissenting in Part

In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits, MM No. 92-264.

There is much to commend in this Order. I join in the decisions to change the basis of the limit from homes passed to actual subscribers; to include non- cable MVPDs in the limit calculation; to repeal the minority-control allowance; and to retain the stay of these rules pending resolution of related litigation. *See* Parts IV-V, VII-VIII. I must dissent, however, the Commission's refusal to raise the limit itself from the current rate of 30%. See Part VI.

The Level of The Horizontal Ownership Limit

I would have raised significantly the relevant rate for cable ownership past the 30% that the Commission today maintains. This rate has been in effect since 1993 and, as the Commission itself has documented in any number of proceedings, the increase in competition in the multichannel video programming market -- assuming that is even the right market, as opposed to all video programmers, the actual terminology of the statute -- has been at least substantial, if not explosive. The statute directs us to take account of these changes. See 613(f)(2)(E) (Commission should "reflect the dynamic nature of the communications marketplace").

This Order even acknowledges these intervening competitive developments in the context of the decisions to change the limit calculation. *See supra* at paras. 28-30. I do not think we can take notice of increased competition for purposes of those ancillary decisions but close our eyes to that same fact in the context of the limit itself. Increased competition either exists or it does not, and the fact of that competition is logically relevant to the calculation of the limit and the limit itself.

Even if one were not willing to admit increased competition since 1993, changes within the cable industry itself -- most significantly, the expansion of channels due to upgrades -- mitigate a cable operator's potential for market power.

Furthermore, the Commission just a few months ago concluded that growth in the communications industry warranted loosening of the broadcast ownership rules. *See generally Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules,* MM Docket Nos. 91-221, 87-8 (rel. Aug. 6, 1999). I would think that some deregulation -- in particular, revising upward the section 11(c) cap -- would have been equally appropriate for the cable industry.

In the attribution Report and Order adopted today, the Commission concludes that "the cable industry's ownership and management structures do not in any relevant way differ from those of the broadcast industry." *Review of the Commission's Cable Attribution Rules,* CS Docket No. 98-82, at para. 11 (adopted Oct. 8, 1999). While I disagree with that statement (the many differences between these particular industries, and thus their ownership and management, are patent, at least to me), I note it in order to highlight the incongruity of the Commission's reasoning in these related decisions. Apparently, the industries are similar enough that we should use the same attribution rules, but when it comes to deregulation, they should not be treated equally. This makes little sense to me.

Part of what contributes to the Commission's view that the limit cannot go any higher than 30% is a fundamental misunderstanding of the premise of section 613(f). The Commission approaches the statute as if it were the "Reasonable Guarantee of Success for Cable Networks Act." Hence, its analysis of the appropriate percentage limit starts with the number of subscribers it takes to launch a new network.

But the Act is not meant affirmatively to ensure that new cable networks have some minimum chance of success in the marketplace. Rather, its plain language reflects an intent to prevent cable operators from "unfair[ly] imped[ing] ... the flow of video programming from the

programmer to the consumer." 47 U.S.C. section 613(f)(2)(A). A cable network can fail to get off the ground for infinite reasons *other than* the exercise of monopsony power by cable operators. The statute is not meant to create a minimum chance of success for one group, but to prevent specific anticompetitive behavior by a different group. We thus should be focusing on what it means for a cable operator or operators to "*unfairly* impede" the flow of programming, but this Order never does that.

Moreover, the "flow" with which the statute concerns itself is of "video programming," not just cable network or even MVPD programming. "Video programming" is a statutorily defined term, *see id.* section 611(20) ("'video programming' means programming provided by, or generally considered comparable to programming provided by, a television broadcast station"), which includes vastly more than just cable network programming. When many paths exist for distributing video programming to consumers -- which there are -- cable operators' ability to impede anything is drastically undermined.

Finally, the constitutional concerns raised by the statute -- grave enough that a federal judge has deemed it violative of the First Amendment, see *Daniels Cablevision v. United States*, 835 F. Supp. 1 (D.D.C. 1993) -- also mitigate in favor of a more generous approach to the limit in order to mitigate the direct burdens on speech imposed by these regulations. A higher subscriber rate, while it might not solve the First Amendment problem, would at least alleviate some of the burden created by the limit.[151] But these rules impose as heavy a burden on speech as the previous ones.

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[151]I note also that, in this Order, the Commission continues to focus, just as it did in the first Order promulgating rules under this section, on the effect of the limit on the content of video programming, belying the claim that these rules are based purely on competition-related goals. *See, e.g, supra* at para. 17 & n. 44 (discussing concern that "unorthodox or unpopular speech is being denied an outlet" and noting that cable operators can (as is their editorial right under the First Amendment) "discourage carriage of popular content that does not suit their taste.").

The Calculation Of The Horizontal Ownership Limit

The foregoing said, I do concur in the separate decisions to base the limit on actual subscribers rather than homes passed, see supra Part IV, and to include non-cable MVPDs in the calculus, see id. Part V. Those decisions make common sense, in that they acknowledge the expanded range and intensity of competition to cable. They also provide some effective relief to cable operators and allow them some room to grow as the MVPD market further develops.

Ultimately, however, the cleaner and more straightforward approach would have been to simply raise the limit itself. Moreover, I would have increased the limit to a greater extent than do these changes to the formula. I support them, however, to the extent they provide some benefit to regulated entities.

The Minority Control Allowance

I also concur in the decision to repeal the minority control allowance. See id. Part VII. As I noted in the Notice of Proposed Rulemaking, this facially race-based provision is presumptively violative of the Equal Protection Clause. See Separate Statement of Commissioner Harold W. Furchtgott-Roth, Second Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, In re Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Limits (rel. June 26, 1998) (discussing application of strict scrutiny to the allowance). Although the Commission chooses to repeal these regulations for reasons of practicality, it makes no attempt to defend the constitutionality of this rigid numerical preference and its supposed connection to programming content in light of either the record in this proceeding or relevant judicial precedent. That is probably wise, because the task is near

impossible, legally speaking.[152]

Administrative Stay Of The Rules

Finally, I concur in the decision to continue the stay of these rules pending resolution of the related litigation in the Court of Appeals for the D.C. Circuit. See supra Part VIII.

Still on the Commission's books, however, is the analog to the minority- control allowance in the channel occupancy context. That regulation allows a cable operator to commit "two additional channels or up to 45 percent of its channel capacity, whichever is greater," to affiliated programming services if those services are minority-controlled. 47 C.F.R. section 76.504(c). This regulation suffers from the very same infirmities under Adarand as the horizontal ownership minority-control allowance. It should also be repealed.

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[152]I note also that, in this Order, the Commission continues to focus, just as it did in the first Order promulgating rules under this section, on the effect of the limit on the content of video programming, belying the claim that these rules are based purely on competition-related goals. See, e,g, supra at para. 17 & n. 44 (discussing concern that "unorthodox or unpopular speech is being denied an outlet" and noting that cable operators can (as is their editorial right under the First Amendment) "discourage carriage of popular content that does not suit their taste.").

STATEMENT OF COMMISSIONER GLORIA TRISTANI, DISSENTING IN PART

In the Matter of Implementation of Section 11(c) Of the Cable TelevisionConsumer Protection and Competition Act of 1992 Horizontal Ownership Limits MM
Docket No. 92-264

I would have lifted the Commission's voluntary stay of its horizontal ownership rules. While the stay may have done little harm in 1993, when it was imposed, it now constitutes a serious threat to the orderly enforcement of our rules and an abdication of our responsibility to implement Congress' express statutory directives.

In the 1992 Cable Act, Congress provided that the Commission "shall ... conduct a proceeding" to establish horizontal ownership limits. In 1993, shortly before the Commission issued its rules, the district court found the horizontal ownership provision of Section 613 unconstitutional on its face.[1] Importantly, the district court judge stayed the effect of his ruling, thereby permitting the Commission to adopt and enforce horizontal ownership rules. Nevertheless, when the Commission adopted its rules shortly thereafter, it voluntarily suspended enforcement pending outcome of the Daniels appeal. The Commission has not always been so quick to abandon Congress' mandates. For instance, although a district court judge found Sections 271-275 of the Communications Act to be an unconstitutional bill of attainder,[2] the Commission continued to enforce those provisions under circumstances similar to those here, until the appellate court eventually reversed the lower court decision.[3]

It has now been seven years since Congress expressly directed the

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[1] *See Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1 (D.D.C. 1993)

[2] See SBC Communications, Inc. v. FCC, 981 F. Supp. 996 (N.D. Tex. 1997).

[3] *See SBC Communications, Inc. v. FCC*, 154 F.3d 226 (5th Cir. 1998).

Commission to establish horizontal ownership rules, and six years since the Commission opted to ignore that directive on its own motion. In 1993, the Commission's decision made little practical difference: no cable operator was close to the 30% limit and appellate review of the Daniels decision could be expected well before the limit was breached.

Times have changed. Now we are faced with the real possibility -- indeed, the virtual certainty, if all pending transactions are approved -- that a single cable operator, AT&T, will be significantly over the 30% cap, even under the liberalized rules being adopted today. Moreover, concentration issues will be squarely before us when we consider AT&T's proposed acquisition of MediaOne -- a decision that will likely come before the D.C. Circuit rules on the Daniels appeal. Without enforceable rules, the Commission will not be able to address the Section 613 ownership issue at the time of the merger review, but, assuming the merger is approved, will have to wait until the D.C. Circuit acts. Not to worry, the majority says: if the D.C. Circuit upholds the horizontal ownership limits, AT&T and others will be required to come into compliance within 180 days of the decision.

The majority's assurances give me little comfort because I do not believe its admonition about divestitures will ever be enforced.[4] This is not a criticism of the Commission, but a recognition of administrative reality. It is much easier to enforce rules on a going-forward basis than to reverse established "facts on the ground." Ultimately, to the extent that the Commission is forced to grant waivers or grandfather ownership interests that violate our rules, Congress' purposes in enacting Section 613 will be eviscerated.

It might be different if the Commission believed there were a substantial likelihood that it would lose on appeal, or if there were some reason to believe that the 30% cap had grown stale. But on August 13,

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[4]I note that the Commission's commitment appears to be waning already. In last year's Order on Reconsideration, the Commission insisted that cable companies be prepared to come into compliance with its rules within 60 days of a judicial decision upholding our rules. On its own motion, the Commission has extended that to 180 days.

1999, the Commission filed a brief in the D.C. Circuit describing at length how, under the applicable standard established in the Supreme Court's *Turner* decisions (which the *Daniels* court did not have the benefit of), the horizontal ownership provisions and the Commission's implementing rules are clearly constitutional. Nor is the 30% cap out-of-date: today's Order reaffirms the 30AEp based on a fresh record.

In the end, the issue of lifting the stay boils down to whether the Commission is serious about implementing Congress' express directive to establish reasonable horizontal ownership limits. Today's decision indicates that it is not.

FCC 93-332

IN THE MATTER OF IMPLEMENTATION OF SECTIONS 11 AND 13 OF THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992

HORIZONTAL AND VERTICAL OWNERSHIP LIMITS, CROSS-OWNERSHIP LIMITATIONS AND ANTI-TRAFFICKING PROVISIONS

MM Docket No. 92-264
Adopted: June 24, 1993; Released: July 23, 1993

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULE MAKING

Comment date: August 23, 1993
Reply comment date: September 3, 1993
By the Commission: Commissioner Barrett issuing a separate statement.

I. INTRODUCTION

1. In this *Report and Order and Further Notice of Proposed Rule Making* ("*Report and Order/Further Notice*"), the Commission adopts regulations interpreting and implementing the anti-trafficking and cross-ownership provisions of the Cable Television Consumer Protection and Competition Act of 1992.[1] The Commission also solicits further comment on its proposals regarding the establishment of subscriber limits and channel occupancy limits required by the 1992 Act. The Commission issued a *Notice of Proposed Rule Making and Notice of Inquiry*[2] ("*Notice*"), in this

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[1]Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, 106 Stat. 1460 ("Cable Act of 1992" or "1992 Cable Act").

[2]*Notice of Proposed Rulemaking and Notice of Inquiry*, 8 FCCRcd 210 (1992) ("*Notice*").

proceeding, which sought comment on the intended objectives and scope of the Section 11(a) cross-ownership restrictions and the Section 13 anti-trafficking provision of the 1992 Cable Act.[3] The *Notice* also sought comment on issues pertaining to the adoption of limits on the number of subscribers any one entity can reach through cable systems owned by such entity; limits on the number of cable channels that can be occupied by vertically integrated programmers ("channel occupancy limits"); and on the appropriateness of imposing limits on the degree to which multichannel video program distributors ("Multichannel Distributors") may engage in the creation and production of video programming, as prescribed by Section 11(c)(2) of the 1992 Act.[4]

2. Section 13 of the 1992 Cable Act adds a new Section 617 to the Communications Act of 1934, as amended,[5] establishing a three-year holding requirement for cable systems. This cable anti-trafficking rule, with certain exceptions, prohibits cable operators from selling or otherwise transferring ownership in a cable system within three years following the acquisition or initial construction of such system by such operator. Section 11(a) of the 1992 Cable Act modifies Section 613(a) of the Communications Act to prohibit the common ownership of a cable system and a multichannel multipoint distribution service

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[3]A list of commenters responding to the issues raised in the Notice, and the references to specific commenters used herein, are listed on Appendix A.

[4]Most commenters addressing the issue of establishing limits on Multichannel Distributor participation in the creation and production of video programming opposed establishing such limits at this time. Most commenters agreed with the Commission's tentative conclusion in the Notice that the objectives of any such restrictions are fully addressed by other provisions of the Act. *See* NCTA Comments at 36-37; Viacom Comments at 19-21; Time Warner Comments at 60-62; TCI Comments at 58; Liberty Media Comments at 9-11. The National Private Cable Association, INTV and Liberty Cable indicated that some limits may be necessary. These commenters, however, did not indicate the rationale for such additional restrictions. The Commission will address this issue, along with the other provisions of Section 11, in a *Second Report Order*.

[5]47 U.S.C. §537.

("MMDS") licensee or a cable system and a satellite master antenna television service ("SMATV"), separate and apart from any franchised cable service, within any portion of the franchise area served by that cable operator's system.[6] The anti-trafficking and cross-ownership provisions of the 1992 Cable Act contain no specific effective date and thus, pursuant to Section 28 of the 1992 Act, became effective on December 4, 1992.[7]

3. In summary, this *Report and Order/Further Notice* contains the following determinations. The Commission concludes that the Section 617 anti-trafficking restriction applies only to assignments and transfers of control of cable systems. Such transactions will be defined generally, by reference to the Commission's broadcast assignment and transfer of control standards used to implement Section 310(d) the Communications Act. The Commission will rely on local franchise authorities to monitor and exercise primary enforcement responsibility under the anti-trafficking rule. Cable operators seeking to assign or transfer control of a cable system are required to certify compliance with the anti-trafficking rule to the local franchise authority at the time such cable operators seek local transfer approval. Disputes regarding the validity of such anti-trafficking certifications, the applicability of the anti-trafficking rule to a particular transaction, or eligibility for one of the rule's exemptions will be handled by the Commission pursuant to the Section 76.7 special relief procedures.[8] The Commission further determines that the statute provides the Commission with authority

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[6]47 U.S.C. §533(a)(2).

[7]Section 617(e) imposes a 120-day limitation on franchise authority consideration of transfer requests for cable systems owned for three years or more. 47 U.S.C. §537(e). The 120-day period commences upon the submission of all information required by Commission regulations and by the franchise authority. The Commission adopts such regulations herein and thus, the 120-day limitation will not become effective until the effective date of this *Report and Order/Further Notice.*

[8]47 C.F.R. §76.7.

to waive the three-year holding period in the public interest and directs the Commission to grant such waivers in cases of default, foreclosure and financial distress. In addition, the Commission adopts a blanket anti-trafficking waiver for small systems, serving 1000 subscribers or less.

4. In connection with transfer requests for systems owned for three years or more, the Commission establishes a standardized transfer approval form, which a cable operator must submit to the franchise authority in connection with such transfer requests. The Commission's transfer approval form solicits information necessary to establish the technical, legal and financial qualifications of the proposed transferee and any information required by the franchise agreement or applicable state or local law. Upon the submission of a completed FCC assignment or transfer approval form and the necessary exhibits, the franchise authority will have 120 days in which to consider such transfer request. Local authorities may request additional information reasonably necessary to determine the qualifications of the proposed assignee or transferee. Such requests, however, generally will not toll the running of the statutory 120-day limitation on franchise authority consideration unless the franchise authority and the cable operator otherwise agree to an extension of time.

5. With respect to the Section 613 cable/MMDS cross-ownership restriction, we modify Section 21.912 of our Rules to implement the statutory restriction. We amend Section 21.912 to prohibit * MMDS cross-ownership only where a cable operator's actual service area and the MMDS protected service area overlap. In assessing cross-ownership, we will consider a cable operator to have an attributable interest in an MMDS licensee if such cable operator holds five percent or more of the stock of such licensee, whether voting or non-voting. We do not adopt a single majority shareholder exception, and all officer and director positions and general partnership interests will be attributable, as will limited partnership interests of five percent or greater, regardless of insulation. We retain the local programming exception under

Section 21.912 as it applies to leased channels, but eliminate the overbuild and rural exceptions.

6. We adopt a separate rule to implement the Section 613 cable/SMATV cross-ownership restriction. The Commission concludes that Congress intended a narrower restriction with respect to cable/SMATV cross-ownership. The rules we adopt prohibit cable operators from acquiring an attributable ownership interest in a separate SMATV service within the cable operator's actual service area. Cable operators are permitted, however, to construct a stand-alone or integrated SMATV system in their actual service area, provided such SMATV service is offered in accordance with the terms and conditions of the cable franchise agreement. The attribution rules we adopt for this purpose are the same as those established for the cable/MMDS cross-ownership restriction. We acknowledge that the statutory cross-ownership restriction prohibits cable/SMATV cross-ownership only in a cable operator's actual service area. Therefore, in the unserved portions of the franchise area, a cable operator is permitted to build or acquire a stand-alone SMATV system, provided such cable-owned SMATV systems are operated in accordance with the terms and conditions of the cable franchise agreement.

7. With respect to establishing subscriber limits as required by Section 613, we seek further comment on our proposal to adopt a national subscriber limit of 25% of homes passed and to attribute cable system ownership based on the same criteria that is used in the broadcast context. However, we continue to seek comment on establishing subscriber limits in the range of 20% to 35% of homes passed nationwide. In addition, we propose to permit ownership of additional cable systems, beyond the 25% limit, if such systems are minority-controlled.

8. We also seek comment on our proposal to adopt a 40% limit on the number of channels that can be occupied on a cable system by programming in which the particular cable operator has an attributable interest. We propose to define vertical attribution for this purpose by reference to the broadcast attribution criteria. In addition, we propose

to allow carriage of additional vertically integrated video programming services provided such video programming services are minority-controlled or are targeted to a minority audience.

IV. SUBSCRIBER LIMITS

A. Background

132. The 1992 Cable Act requires the Commission to establish horizontal ownership limits. Specifically, Section 11(c)(2) of the 1992 Cable Act requires the Commission to place limits on the number of subscribers an entity can reach through cable systems owned by that entity.[111] The establishment of these "subscriber limits" is intended to address Congress' concern regarding increasing horizontal concentration in the cable industry. Congress found that increased concentration in the cable industry had the potential to create barriers to entry for new programmers and to reduce the number of media voices available to consumers.[112]

133. In establishing the ownership limits mandated by Section 11, the 1992 Cable Act directs the Commission to consider the following public interest objectives of the legislation: (A) to ensure that no cable operator or group of cable operators can unfairly impede the flow of video programming from the programmer to the consumer; (B) to ensure that cable operators do not favor affiliated video programmers in determining carriage and do not unreasonably restrict the flow of video programming of unaffiliated video programmers to other video distributors; (C) to take account of the market structure, ownership patterns, and other relationships of the cable industry, including the market power of the local franchise, joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests; (D) to take into account any efficiencies and other benefits that might be gained through increased ownership or control; (E) to ensure that such rules and regulations reflect the dynamic nature of the communi-

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[111] 47 U.S.C. §553(f)(1)(A).

[112] 1992 Cable Act, Section 2(a)(4).

cations marketplace; (F) to impose limitations that will not prevent cable operators from serving previously unserved rural areas; and (G) to impose limitations that will not impair the development of diverse and high quality programming.[113]

134. Proposal. Before imposing definitive horizontal ownership restraints on the cable industry, we want to be certain that in so doing we have struck the proper balance among the competing public interest objectives congress directed us to consider. Our review of the comments in response to the Notice has persuaded us that further comment on a number of matters is necessary before we can establish appropriate subscriber limits. However, the record to date has helped us to form certain tentative conclusions. Therefore, at this time, we seek further comment on our proposals regarding the appropriate threshold and application of the subscriber limits. In brief, we propose to adopt a national subscriber limit of 25% of homes passed and to attribute cable system ownership based on the same criteria that is used in the broadcast context.[114] However, we continue to seek comment on establishing subscriber limits in the range of 20% to 35% of homes passed nationwide. In addition, we propose to permit ownership of additional cable systems, beyond the 25% limit, if such systems are minority-controlled.

B. Applicable Market.

135. *Notice.* In the *Notice* we asked commenters to indicate whether regional or national subscriber limits, or both, were necessary to implement the objectives of the 1992 Cable Act. We noted that while

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[113]47 U.S.C. §533(f)(2). Congress intended these public interest considerations to apply to all ownership limits mandated by Section 11(c)(2), including the channel occupancy limits discussed *infra.*

[114]47 C.F.R. 73.3555 (Notes).

the legislative history of the 1992 Cable Act focused on national subscriber limits, it also discussed regional concentration. Additionally, we cited findings from the 1990 Cable Report, concluding that the level of national concentration in the cable industry did not warrant regulatory intervention, but indicating that regional concentration could lead to MSOs engaging in anti-competitive behavior on a regional basis without disrupting national markets.

136. Comments. Cable commenters addressing the issue of whether subscriber limits should apply to national and/or regional markets all favor establishing only national subscriber limits. Several cable commenters argue that the Commission lacks the authority to promulgate regional limits under the 1992 Cable Act. Additionally, they believe that national limits best serve the objectives of the 1992 Cable Act since most programming distribution occurs on a national, not a regional, basis. Also, these parties contend that regional limits would threaten the marketplace efficiencies afforded by regional concentration, such as expanded customer service and increased local programming.[115] Only INTV supports imposing regional subscriber limits, arguing that such limits are necessary to curb the anti-competitive power of MSOs in local advertising markets.[116] INTV would have the Commission prohibit a single cable operator from reaching more than 50% of the homes passed in a local market (as defined by Arbitron's

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[115] *See, e.g.* TCI Comments at 27-28; Time Warner Reply Comments at 2-5; NCTA Reply Comments at 5-6.

[116] INTV contends that in markets with only one cable operator, that operator is the conduit for all local advertising and therefore is in the position to dictate local advertising prices, which places other local media (*e.g.*, TV stations) at a considerable disadvantage. INTV Comments at 7-8. In response, cable commenters argue INTV's assertions are disingenuous since data shows that broadcast stations continue to control an overwhelming share of the local advertising market as compared to cable interests. *See* TCI Reply Comments at 19-20; NCTA Reply Comments at 12-13.

Area of Dominant Influence or ADI).[117]

137. Discussion. We propose to adopt exclusively national subscriber limits. We agree with the majority of commenters who conclude that national subscriber limits best serve the objectives of the 1992 Cable Act because most programming distribution occurs on a national, not a regional basis. We are also concerned that the imposition of regional limits may sacrifice many of the benefits and marketplace efficiencies associated with regional concentration, such as investment in the deployment of fiber optic cable, development of local and regional cable programming and improved customer service. Moreover, we are cognizant that denying cable operators the benefits of regional concentration could impede their ability to become competitors of local telephone companies.

138. Commenters are asked to indicate whether the proposed national subscriber limits would suffice to implement the objectives of the 1992 Cable Act. In addition, we would like commenters to consider whether the benefits of regional concentration outweigh the possible anti-competitive harm that such concentration may have on the local advertising and programming marketplace. Finally, we are concerned that if we impose regional limits, other multichannel video distributors may not be available to serve unserved subscribers in all communities. We ask commenters to address this issue as well.

C. Measurement and Percentage Limitation.

139. *Notice.* The *Notice* sought comment on the measure that should be used to implement subscriber limits. We indicated that subscriber limits could be defined either as a share of cable subscribers or as a share of homes passed. However, after consideration of the two standards, the *Notice* proposed adoption of a homes passed measure. We

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[117]INTV Comments at 8.

tentatively concluded that while a subscriber-based standard is the more traditional measure, a homes passed standard is more appropriate because: (1) it encompasses all television households for which a particular cable operator provides access to cable programming; (2) it is more stable than a subscriber-based limit; and (3) it encourages the addition of new subscribers.

140. The *Notice* also asked commenters to indicate what percentage of homes passed nationally would constitute a reasonable limit on horizontal concentration. Specifically, we proposed a limit in the range of 25% to 35% of homes passed and asked a series of other questions designed to discern the level of subscribership needed to successfully launch new cable programming services. We also questioned whether the audience reach limits of the broadcast multiple ownership or network-cable cross-ownership rules were relevant to determining subscriber limits in this proceeding.[118] Furthermore, we observed that the Senate Report suggests that Section 11 was not intended to require divestiture by any existing MSO. The *Notice* also invited comment on whether we should establish a minority ownership incentive similar to the one used in the broadcast context, which provides for increased ownership of broadcast stations representing up to 30% of the television households nationwide if such additional stations are minority controlled.[119]

141. Comments. Most commenters addressing the issue of how to calculate subscriber limits, favor measuring the audience reach of cable systems by a homes passed standard rather than a subscriber-based

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[118]The Commission's broadcast multiple ownership rules limit the audience reach of television stations in which a single entity can hold an attributable interest to 25% of television households nationwide. *See* 47 C.F.R. §73.3555. The network-cable cross-ownership rule provides that national television networks can own cable systems which reach 10% of the homes passed nationally. *See* 47 C.F.R. §76.501.

[119]*See* 47 C.F.R. §73.3555(d).

standard. For example, Liberty Media, NATOA, MPAA, INTV and TCI all agree that a homes passed standard is more appropriate because a measure based on the number of subscribers is unstable and may have the effect of discouraging subscriber growth.[120] NCTA supports a homes passed standard too, but also believes the standard should reflect the fact that cable operators facing "effective competition" are unable to impede the flow of programming. NCTA therefore suggests subtracting from the number of homes passed all households that are also passed by a competing distribution service.[121] Only Intermedia favors a subscriber-based measure for determining the size of a cable operation, arguing that a subscriber-based measure is more accurate and is necessary to determine whether there is effective competition.[122]

142. Time Warner and GTE advocate the use of alternative measures. Time Warner suggests calculating subscriber limits by measuring the cable operator's share of subscribers who have access to programming either by means of cable or through other multichannel video distributors.[123] According to Time Warner, this approach would provide a

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[120] *See* Liberty Media Comments at 32; NATOA Comments at 20; Discovery Comments at 8-9; MPAA Comments at 6; INTV Comments at 4; TCI Comments at 28-29.

[121] NCTA Comments at 15. Alternatively, NCTA would have the Commission measure a cable operator's size as a percentage of the number of subscribers served not just by cable systems, but by other distribution technologies as well. *Id.* at 15 n. 31.

[122] Intermedia Comments at 9.

[123] Time Warner would make this determination based on a percentage that has, (a) as its numerator, the number of cable subscribers served by the cable operator in question, and that has, (b) as its denominator, the sum of (i) the number of all cable subscribers nationally and (ii) the number of subscribers to other multichannel video programming distributors. Time Warner Comments at 18-19.

truer measure of an operator's ability to impede the flow of video programming than would any measure based solely on cable subscribership or cable homes passed. GTE proposes another approach that would determine the audience reach of a cable operator based on its "total franchise area homes." According to GTE, substantial portions of existing cable franchise areas are not wired and therefore cannot pass all homes that are authorized to receive service. Consequently, GTE believes a measure based on the entire cable franchise service area--even if part of the area is not wired--would encourage operators to expand service into unbuilt areas.[124]

143. On the issue of establishing a reasonable limit on horizontal concentration, cable commenters generally support a subscriber limit of approximately 40% of homes passed nationally.[125] Relying on marketplace experience, antitrust principles and other factors, these commenters contend that there is no basis on which to conclude that an

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[124]GTE Comments at 2. In its reply comments, Time Warner opposes GTE's suggested approach, arguing its would not accurately reflect an operator's ability to impede the flow of programming, which was Congress' concern in enacting the statute. Time Warner argues that where an operator has not laid cable, it can do nothing to prevent others from providing service. Moreover, Time Warner points out that unbuilt areas provide opportunities for alternative distributors such as SMATV, MDS and MMDS. Time Warner Reply Comments at 8-10.

[125]Discovery advocates setting subscriber limits at a level considerably higher than the present degree of horizontal concentration. According to Discovery, the Commission can determine at what percentage a cable operator may effectively preclude the success of a new cable service by identifying the penetration level that an alternative technology distributor needs to survive. Discovery points out that Congress defined "effective competition" in Section 3 of the 1992 Cable Act in terms of at least two unaffiliated distributors both of which have a subscriber base of more than 15% of the households passed. Thus, Discovery indicates that under Congress' own definition, effective competition can exist even when one operator has 85% penetration. Discovery Comments at 7-9.

MSO with a 40% market share can impede the success of new programming services. They urge the Commission to avoid strict horizontal ownership limits that could preclude the efficiencies and benefits that result from continued horizontal growth.[126] Furthermore, they believe that Congress did not intend for the Commission to impose limits that would force existing MSOs to divest.[127]

144. In support of their position that a 40% subscriber limit is reasonable, cable commenters argue that extensive subscriber penetration is

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[126]For example, Discovery states that if the Commission adopts strict subscriber limits, the impact would be to sharply reduce the revenues of the programmers carried by large MSOs, which could threaten the survival of many programming networks. Discovery Comments at 5-6. TCI also submitted a study concluding that strict limits on horizontal ownership could diminish the quality, quantity and diversity of available programming. TCI Comments at 15-17. *See also* Besen, *et al.*, "An Economic Analysis of the FCC's Proposed Cable Ownership Restrictions" (filed Feb. 9, 1993) ("Besen Study") (attachment to TCI Comments). The Besen Study finds that the aggregation of subscribership does not harm consumers because cable systems do not compete directly against one another. According to Besen, while a large subscriber base may increase the bargaining power of an MSO in dealing with program suppliers, it does not affect the diversity of programming selected and distributed or distort the allocation of resources to the production of programming. Besen Study at 22.

[127] *See, e.g.* Time Warner Reply Comments at 11-14.

not essential to the success of a new programming network. Time Warner, TCI and NCTA contend that many program services have flourished at subscriber penetration levels well below 60%.[128] Time Warner provides examples of several successful program services that began with low penetration levels and which gradually gained audience share as their product improved or their popularity grew.[129] Cable commenters also observe that many factors determine the level of audience penetration necessary to make a new program service an economic success, including the degree to which a service is supported by subscriber fees versus advertising revenues and the type of programming service involved.[130] Finally, cable commenters rely on

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[128]These commenters note that program networks such as Black Entertainment Television ("BET"), The Learning Channel, Bravo and Court TV have had great success with penetration levels of less than 30% to 40%. Time Warner Comments at 28-29; TCI Comments at 24-25; NCTA Comments at 16.

[129]Time Warner Comments at 27-28. For example, Time Warner notes that The Family Channel, which was launched in 1977 achieved less than 10% penetration of all cable homes by its second year of operation, achieved only 22.1% in its third year, but approached 60% penetration by its sixth year of carriage. Another example provided by Time Warner is Nickelodeon, which achieved only 15.1% penetration in its second year of operation and now enjoys over 90% penetration. *Id.*

[130]*See, e.g.* NCTA Comments at 17. Time Warner, for example, points out that a service that emphasizes license fees as a source of revenue may need less penetration than will a service that is primarily dependent upon advertising revenues. Additionally, Time Warner notes that the cost structure of the service will determine the revenue level (and will thus influence the degree of penetration) that the service must reach to achieve profitability. Thus, a service that offers relatively expensive programming (*e.g.*, recently released theatrical motion pictures) will have a higher cost structure, and will need to achieve greater revenues, than will a service that depends upon less expensive programming (*e.g.*, news and syndicated TV programs). Time Warner Comments at 25-26.

antitrust principles, arguing that a single firm cannot exercise monopoly power with less than 50% of the relevant market.[131]

145. In contrast to the cable commenters, MPAA advocates a 25% subscriber limit, which would effectively cap the largest MSO at its present level of concentration.[132] MPAA does not believe Congress intended for subscriber limits to be set above existing levels of horizontal concentration since it was existing levels of market power that prompted congress to take action. MPAA also challenges the use of traditional antitrust market concentration measures as a basis for adopting a 40% subscriber cap. According to MPAA, such antitrust measures are not an accurate determinant of MSO market power because most cable systems do not compete with one another in the program acquisition market. MPAA also challenges the contentions of several cable commenters that a 40% cap is reasonable because new program services can survive with less than 60% penetration of cable households. MPSS believes its proposed 25% subscriber cap is liberal enough since if more than one operator approaches the 25% concentration figure, an independent programmer may have its market access

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[131]NCTA Comments at 17; TCI Comments at 19-23; Time Warner at 21-23.

[132]MPAA conditions its support for a 25% subscriber cap on the Commission adopting reasonable program access, leased access and attribution requirements. Otherwise, MPAA states that it advocates a limit lower than 25%. MPAA Comments at 5. NATOA also advocates a 25% subscriber cap. NATOA Comments at 19. NATOA believes that for the Commission to adequately correct the market aberrations caused by the anticompetitive practices of current MSOs, such MSOS should be required to divest current holdings. *Id.*

limited to only 50% of homes passed.[133]

146. Only INTV advocates a subscriber limit lower than that proposed in the *Notice*.[134] Specifically, INTV believes a subscriber cap of no more than 10% is appropriate.[135] INTV calls for stricter horizontal ownership controls than are used in the broadcast context. According to INTV, such strict limits are necessary because cable operators (unlike broadcasters) face little or no competition in the local marketplace. INTV argues that its proposal is consistent with the intent of Congress to enact regulations that do not allow the status quo to prevail.[136]

147. Discussion. In adopting horizontal ownership limits we seek to balance Congress' concerns regarding the ability of the largest MSOs to preclude the launch of new programming services with the benefits

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[133]MPAA Reply Comments at 2-4.

[134]However, David Waterman of the Annenberg School for Communications submitted a study suggesting that MSOs with less than 25% of the homes passed nationally may still be able to unduly influence the programming acquisition market. *See* Waterman Comments at 3 and Waterman, "Local Monopsony and Free Riders In Information Industries" (filed Feb. 9, 1993) (Waterman Study) (attachment to Waterman Comments). Time Warner and other commenters challenged Waterman's conclusions, charging that his study erroneously assumes that cable programming networks need to reach all cable subscribers and that cable networks primarily offer original programming. *See, e.g.* Time Warner Reply Comments at 14-16.

[135]Recognizing that its proposal would force divestiture of existing MSOs, INTV suggests applying the 10% cap prospectively. INTV Comments at 7.

[136]Time Warner, Liberty Media, TCI and NCTA all criticize INTV's proposed subscriber limit. TCI, for example, argues that a 10% cap is at odds with Congressional intent, since such a strict standard would impair development of diverse and high quality video programming. TCI Reply Comments at 17. NCTA argues that a 10% limit would be "absurd," and claims that INTV fails to acknowledge Congressional findings regarding the benefits of horizontal concentration (*i.e.*, efficiencies in administration, distribution and procurement of programming). NCTA Reply Comments at 11.

to consumers that result from some degree of horizontal concentration. Consequently, we propose to adopt a horizontal ownership limit prohibiting any one entity from owning cable systems that in the aggregate reach more than 25% of all cable homes passed nationwide, although, we continue to seek comment on subscriber limits in the range of 20%-35%. We believe that a subscriber limit of approximately 25% may be appropriate to prevent the nation's largest MSOs from gaining enhanced leverage from increased horizontal concentration, while ensuring that MSOs continue to benefit from the economies of scale necessary to encourage investment in new programming services and the deployment of advanced cable technologies. We also favor a 25% limit because it will not require divestiture by any cable operator, which we believe would be disruptive to the cable industry. The legislative history of the 1992 Cable Act suggests that the Congress did not intend for our efforts to disrupt existing cable ownership relationships.[137] Nonetheless, before we adopt this specific limit, we want to be certain that we have fully considered all the marketplace implications of such a limit. Therefore, we invite further comment on establishing subscriber limits in a range of 20%-35%.

148. We note that we regard the 10% limit proposed by some commenters to be contrary to the legislative history since it would require divestiture by some cable operators and would sacrifice the efficiencies achieved by horizontal concentration. On the other hand, there is some indication in the record that a higher limit of 30%-35% would be reasonable to allow for future MSO growth without precluding the launch or success of new programming services. In setting a specific percentage limit, we seek to set the limit high enough to preserve the benefits of horizontal concentration, while ensuring that cable operators cannot impede the flow of video programming.

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[137] *See* Senate Report at 34 ("the legislation does not imply that any company must be divested").

149. We ask commenters favoring limits below 25% to indicate how such limits can be squared with the Senate Report's indication that divestiture of existing systems was not intended. In addition, these commenters are asked to discuss the effect that such divestiture would have on service to subscribers, programming carriage agreements, and on future MSO investment in new programming and technology. Conversely, we ask commenters arguing for a limit above 25% to discuss the effect that such limits will have on the ability of new programming services to obtain MSO carriage and to indicate the competitive rationale for a higher limit, given the lack of competition faced by most cable operators locally and in the program acquisition market. We also ask commenters to address the effect of the prohibitions on anti-competitive practices established under Section 12 and 19 of the 1992 Act on the appropriate level for subscriber limits.

150. We further propose to allow ownership of additional cable systems, beyond the limit ultimately adopted, provided such systems are minority-controlled. The Commission adopted a similar policy in the broadcast context in order to encourage increased minority ownership of media outlets. To date, no commenters have addressed this proposal. We ask commenters to indicate whether allowing such increased ownership is desirable to encourage minority ownership of cable systems as a means of encouraging diversity of programming. We also ask commenters to indicate the appropriate amount of such increased ownership.

151. As we indicated in the *Notice*, we believe that it is appropriate to measure subscriber limits as a share of homes passed rather than as a share of cable subscribers. Most commenters endorsed this standard, indicating that a measure based solely on the number of cable subscribers is not optimal because it is relatively less stable and would discourage increased subscribership. We prefer a homes passed standard because it more accurately measures a cable operator's potential reach, by encompassing all television households for which a particular cable operator has the ability to provide service. We ask commenters to

indicate whether this measure is reasonable and appropriate to our objectives.

152. Also, as referenced in the *Notice*, we propose to calculate compliance with the national subscriber limits by subtracting the number of homes passed by cable systems in areas where "effective competition"--as defined under the 1992 Cable Act--is established.[138] We question, however, whether we should include for this purpose the definition of effective competition that applies to cable systems subscribed to by fewer than 30% of the households in the franchise area. We ask commenters to address whether this definition of effective competition is relevant to the competitive concerns which underlie the establishment of subscriber limits. In addition, some commenters advocate more lenient approaches and, for example, ask us to subtract from the number of homes passed those homes that are also passed by a competing program distributor, regardless of whether "effective competition" is established. We ask commenters to indicate why a more lenient definition of effective competition would be appropriate for purposes of subscriber limits than for purposes of rate regulation since both provisions are concerned with establishing the threshold

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[138]Under Section 3 of the 1992 Cable Act "effective competition" is established where "(A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system; (B) the franchise area is--(i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15% of the households in the franchise area; or (C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area." *See* 47 U.S.C. §543.

level of competition at which cable operators will be deterred from engaging in anti-competitive practices. We invite commenters to discuss this issue, as well as our proposal to adopt a homes passed standard, and any other matters relevant to this recommendation.

D. Horizontal Attribution Standard.

153. *Notice.* The *Notice* questioned whether the broadcast attribution criteria, or some other ownership attribution criteria should be used to implement cable subscriber limits. In particular, we asked if there are other types of ownership interests, such as non-equity interests, that should be cognizable for purposes of determining ownership under our subscriber limits.

154. Comments. With respect to establishing attribution criteria for determining the application of the subscriber limits, cable commenters believe the Commission should focus on the ability of the cable operator to control programming choices. Accordingly, NCTA argues for an attribution standard based on actual stockholder or managerial control of a cable system.[139] In particular, TCI advocates an attribution standard that would (1) exempt ownership interests under 10% ownership; (2) attribute interests of 50% or more; and (3) prorate interests between 10% and 50% based on the number of subscribers served by the system.[140] Cable commenters generally oppose setting the attribu-

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[139]NCTA Comments at 21.

[140]TCI Comments at 13-14. TCI would also incorporate a single majority shareholder exception as is used in the broadcast context. *Id.*

tion standard at 5% as was done in the program access proceeding.[141] Time Warner, for example, argues that such a strict standard is inappropriate because a 5% interest holder is incapable of influencing a cable system's program choices.[142]

155. On the other hand, MPAA, BellSouth, INTV and GTE advocate a stricter attribution standard than is proposed by the cable industry. Specifically, MPAA favors adoption of the same attribution criteria that is used to determine system ownership in the broadcast context under Section 73.3555 of the Commission's Rules. MPAA believes this criteria has worked well in the broadcast area and contends that the Senate Report instructed the Commission to use the broadcast attribution model.[143] BellSouth urges the Commission to apply the same broadcast attribution model to the telephone, cable and broadcast industries.[144] INTV favors attribution standards similar to those used in the network-cable cross ownership rule. According to INTV, a 5%-10% attribution standard is warranted because cable operators enjoy a local

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[141] *See Program Access Report and Order*, 8 FCCRcd 3359 (1993).

[142] Time Warner Comments at 19-20. Time Warner also contends that Congress did not intend for the Commission to adopt such a strict attribution standard, noting that the Senate Report that preceded the 1992 Cable Act mentioned the broadcast standard under Section 73.3555 as a possible model for developing attribution criteria. *Id.*

[143] MPAA Comments at 6.

[144] BellSouth Comments at 2.

monopoly.[145] GTE supports establishing attribution standards similar or identical to those applied to the telephone industry in the cable-telco cross ownership rule and as amended in the video dialtone proceeding.[146]

156. Discussion. We propose to adopt attribution criteria similar to the broadcast attribution criteria contained in Section 73.3555 of the Commission's Rules. Generally, under the broadcast attribution criteria, all non-voting stock interests (including most "preferred" stock classes) are generally not attributable. All voting stock interests of 5% or more are generally considered attributable. There are several exceptions to the presumption of attribution created by this 5% benchmark. Most notably there is a single majority shareholder exception, which provides that minority interests will not be attributed where there is a single 51% shareholder. In addition, the interests of "insulated" limited partners are not attributed. We believe that application of these attribution criteria in the context of subscriber limits is appropriate since the same issues regarding influence and control over management and programming decisions are at issue here. However, we request further comment on whether all these criteria are appropriate and applicable in the cable context.[147] We also invite commenters to evaluate the relevance of any of the other provisions or exceptions contained in Section 73.3555 to this proceeding.

157. In favoring the use of Section 73.3555 attribution criteria, we note that the objectives of the broadcast attribution model are consistent

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[145]INTV Comments at 5-6.

[146]GTE contends that the cable industry possesses power in local video distribution rivalling or exceeding the power of local telephone exchange companies in voice transmission. GTE Comments at 3. *See* 47 C.F.R. §63.54 (cable-telco cross-ownership restriction). *See also Video Dialtone Report and Order*, 7 FCCRcd 5781 (1992). In the video dialtone proceeding, the Commission amended its cable-telco rule to permit ownership interests of up to 5% by telephone companies in video programmers. *Id.* at 5802.

[147] *See* 47 C.F.R. §73.3555 (Notes).

with our goals in establishing ownership standards for subscriber limits. In this regard, the broadcast attribution rules focus on ownership thresholds that enable a broadcast licensee to influence or control management or programming decisions. We believe this same approach is relevant to addressing the concerns at issue in this proceeding, which relate to the ability of cable operators to unduly influence the programming marketplace. We also note that the legislative history of the 1992 Cable Act supports the use of the broadcast attribution criteria.[148] Furthermore, the same attribution criteria are used in the network-cable cross-ownership rule.[149] We believe that use of this attribution standard in these related contexts supports use of the same standard in the context of cable horizontal ownership limits.

158. Several commenters advocate a stricter approach, such as the video dialtone attribution standard, which attributes 5% voting or non-voting stock interests without exception.[150] While such an approach is consistent with the attribution criteria used in other cable contexts (*e.g.*, program access and cable/MMDS and cable/SMATV cross-ownership), we conclude that such an approach is unwarranted in this context.[151] This strict standard was developed as a modification of the cable/telco cross-ownership restriction in order to allow limited participation by telephone companies in the provision of video pro-

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[148] *See* Senate Report at 80. The Senate Report indicates that the Commission should use the attribution criteria set forth in Section 73.3555 (Notes) of our Rules, or such criteria as the Commission deems appropriate in determining ownership under the subscriber limit regulations.

[149] *See* 47 C.F.R. §76.501.

[150] *See supra* paragraph 155.

[151] The Commission adopted a strict attribution standard to implement Section 19 of the 1992 Cable Act. Specifically, a cable operator with 5% or more of the stock of a programmer, whether voting or nonvoting, is deemed to hold an attributable interest in that programmer for purposes of the regulations implementing Section 19. *See Program Access Report and Order*, 8 FCCRcd 3359 (1993).

gramming. These strict attribution standards were designed to ensure competition among rival distribution technologies. In this proceeding, however, our aim is to prevent any one cable operator from impeding the flow of video programming, which we believe warrants less restrictive attribution criteria.

159. In addition, several cable interests advocate that our attribution standard should focus exclusively on control, since in the absence of control, an operator does not have the ability to direct a system's programming choices.[152] Specifically, cable commenters would apply an ownership standard based on stockholder or managerial control of a cable system. Our attribution rules have long recognized that parties that have less than a majority equity interest in a media property can influence management and programming decisions.[153] We see no reason at this time to diverge from this longstanding principal. We encourage commenters to discuss these conclusions.

160. Finally, we do not endorse TCI's proposal to that we adopt a prorated attribution standard for all stock interests above 10%. First such an approach assumes that a 10% equity threshold is appropriate. However, this issue is currently being considered by the Commission in a separate rulemaking proceeding.[154] Moreover, such an approach fails to account for *de facto* control situations, where holders of a minor-

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[152] *See* Time Warner Comments at 30-31. *See also* Discovery Comments at 19-20; NCTA Comments at 20-21; and Liberty Media Comments at 36-37. Time Warner argues "control" normally is achieved by majority stock ownership, but does not necessarily want the Commission to adopt a "bright line" control standard. Rather, it would have the Commission evaluate ownership relationships on a case-by-case basis to determine whether an operator is impeding the flow of programming.

[153] *See* 47 C.F.R. §73.3555 and 76.501. These provisions were last reviewed comprehensively in 1984. *See Report and Order* in MM Docket No. 83-46, 97 FCC2d 997 (1984) (*Attribution Order*), *reconsidered* 58 RR2d 604 (1985) (*Attribution Reconsideration Order*), *further reconsidered* 1 FCCRcd 802 (1986).

[154] *Notice of Proposed Rule Making and Notice of Inquiry*, 7 FCCRcd 2654 (1992) ("Capital Formation Proceeding").

ity interest exercise actual control over management and programming decisions. When such *de facto* control exists, access to all of a system's subscribers is affected, and therefore all subscribers should be attributed.

E. Jurisdiction and Enforcement.

161. *Notice.* The *Notice* asked commenters to address how compliance with the subscriber limits should be monitored and enforced. Noting that few cable systems are presently in the range of the proposed subscriber limit of 25%-35%, the *Notice* suggested that a system of certification may be sufficient to enforce such limits. We indicated that we could require cable operators upon transfer or assignment of a cable system to certify that the transfer or sale would not violate the subscriber limits (i.e., by resulting in ownership of cable systems whose combined subscribership exceeds our limit). We asked commenters to discuss the merits of certification and whether all cable systems or only the largest systems should be subject to such certification requirements. Alternatively, we indicated that we could enforce subscriber limits on a complaint only basis, whereby parties believing that a particular acquisition would violate the subscriber caps, would notify the Commission of the potential violation. Finally, we questioned whether waivers or exceptions to the subscriber limits should be used in some circumstances and whether we should periodically review the ownership limits to ensure that our regulations are responsive to dynamic nature of the cable industry.

162. Comments. Commenters responding to jurisdiction and enforcement concerns agree that the Commission should enforce the subscriber limits on its own initiative. NCTA and Time Warner argue that implementation of a complaint and certification process would be unnecessarily costly and burdensome.[155] They point out that no system is in immediate danger of violating the 25% subscriber limit proposed in the

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[155]NCTA Comments at 23-23; Time Warner Comments at 31-33.

Notice and that the Commission can readily enforce its limits using publicly available data. Time Warner specifically opposes an enforcement process that would direct complaints to the local franchise authorities. Time Warner argues that local franchise authorities do not have the resources or the experience to properly assess subscriber limit compliance matters.[156]

163. On the question of whether we should allow for waivers or exceptions in appropriate circumstances, Time Warner and NCTA suggest that such waivers or exceptions should be obtainable for expansion of service into previously unserved rural areas and for de minimis violations (i.e., when commercial circumstances temporarily place an operator over the limits).[157] In addition, MPAA, Time Warner and NCTA favor the Commission's proposal in the *Notice* for periodic review of the subscriber limits every five years.[158]

164. Discussion. We propose that the FCC should enforce the suggested subscriber limit. We believe that in enforcing the subscriber limits it may be unnecessary to institute a formal certification process, whereby all cable operators must verify upon transfer or assignment of a cable system that they are in compliance with our subscriber limits. Commenters have suggested and we agree that such a process would be unnecessary and unduly burdensome since only a few MSOs are close to the proposed 25% threshold. However, we request additional comment on whether such certification should be required for cable operators currently reaching 20% or more of homes passed. Alternatively, it may be possible for us to adequately monitor and enforce

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[156]Time Warner Comments at 31-33.

[157]Time Warner Comments at 34; NCTA Comments at 23 n. 50.

[158]MPAA Comments at 6-7; Time Warner Comments at 35; NCTA Comments at 23.

subscriber limits through the use of readily obtainable public information Cregarding cable system ownership. Commenters favoring such an approach should indicate whether the necessary information regarding cable system ownership and the share of homes passed by the largest MSOs is publically available and the appropriate source that should be used to obtain such information on a regular basis. In addition, we believe that the Commission, and not the local franchise authorities, are the appropriate entity to consider any complaints asserting that a particular MSO is in violation of the subscriber limits. We seek comment on these proposals.

165. Cable commenters have also requested that we waive or exempt MSOs from the subscriber limits in instances of de minimis violations (such as when an acquisition temporarily places a cable operator over the permissible number of subscribers) or when an MSO is seeking to expand service into an otherwise unserved rural area. We agree that waivers may be appropriate in these situations and propose to consider such waiver requests on a case-by-case basis. We invite commenters to discuss these conclusions and indicate whether waivers may be appropriate in other circumstances.

166. Finally, in view of the fact that the cable market is a dynamic and changing industry, we believe that periodic review of the ownership limits is necessary. As we proposed in the *Notice*, we plan to review the subscriber limits every five years to determine whether such limits are reasonable under the prevailing market conditions. Commenters responding to this issue generally favored a five year review. We invite further comment on this proposal and ask commenters to indicate whether review every five years will be adequate to ensure that our regulations are responsive to the dynamic nature of the cable industry.

D. Ordering Clauses.

244. Accordingly, IT IS ORDERED that pursuant to the authority contained Sections 2(a), 4(i) and (j) and 303 of the Communications Act of 1934, as amended, and the Cable Television Protection and Competition Act of 1992, Pub.L. No. 102-385, Part 21 of the Commission's Rules, 47 C.F.R. Part 21, and Part 76 of the Commission's Rules, 47 C.F.R. Part 76, ARE AMENDED as set forth in Appendix D below, and will become effective 30 days after their publication in the Federal Register, except 47 C.F.R. §76.502(i) which will become effective 90 days after publication in the Federal Register.

E. Additional Information.

245. For additional information regarding this proceeding, contact Jacqueline Chorney, Mass Media Bureau, (202) 632-6990.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

Acting Secretary

SEPARATE STATEMENT OF COMMISSIONER
ANDREW C. BARRETT

RE: Implementation of the Cable Television Consumer Protection and Competition Act of 1992--Cable Ownership

This *Report and Order* adopts regulations interpreting and implementing only the anti-trafficking and cross-ownership provisions of the 1992 Act, which: (i) establish a three-year holding period for cable systems, and (ii) prohibit cable operators from holding and MMDS license or offering SMATV service, apart from any franchised cable service, in portions of the franchise area served by the cable operator's cable system. The Further *Notice* of Proposed Rulemaking regarding horizontal ownership and channel occupancy limits seeks additional comment on various proposals prior to implementing these provisions of the 1992 Act.

With respect to the *Further Notice of Proposed Rulemaking*, I write separately to voice my concern regarding the importance of considering the horizontal and vertical ownership limits in context with the Commission's prior decisions on rate regulation and program access. Given the existing behavioral regulations imposed on vertically integrated cable operators and programming vendors, I emphasize that these cable ownership provisions will play a critical role in determining whether the future broadband network will ultimately belong to all multichannel competitors, including cable operators, to the extent that they remain able to invest and exercise creativity. Similarly, I will remain interested in the extent to which the channel occupancy rules permit future opportunities for investment and development of new ventures and programming. I am also concerned that these ownership rules--as well as all the implementing regulations for the 1992 Cable Act--incorporate sufficient flexibility to address the unique economic concerns of small operators and minority programmers in order to continue to foster a dynamic industry.

Concerning specific proposals contained in the *Further Notice*,

I will be interested in seeing comment from the public on the merits of the proposed 25% limit on homes passed nationally, or another appropriate standard within the 20-35% range of homes passed. I am also interested in comment regarding the possibility of incorporating a provision for a higher horizontal ownership threshold where systems are minority controlled. With respect to the channel occupancy limits, I am especially interested in comments regarding our proposal to allocate additional channel capacity to vertically integrated programming services that are minority-owned.